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TRANSCRIPT OF RECORD

11194

No. 2437

IN THE

Supreme Court of the United States

October Term, 1946

No.

ZOA H. ZANE and JACK ZANE, her husband,
Petitioners,
vs.

PACIFIC GREYHOUND LINES, a corporation,
Respondent.

**UPON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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No. 11194

United States
Circuit Court of Appeals
for the Ninth Circuit.

PACIFIC GREYHOUND LINES, a Corporation,
Appellant,
vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript.

In the District Court of the United States
for the District of Arizona

Civ. No. 642

ZOA H. ZANE and JACK ZANE, her husband,
Plaintiffs,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

COMPLAINT

The plaintiffs above named complain against the defendant above named, and for their causes of action and statements of claim against the defendant allege as follows:

FIRST CAUSE OF ACTION AND STATEMENT OF CLAIM

I.

That the plaintiffs, and each of them, are, and at all times hereinafter mentioned were, citizens and residents of the State of Arizona; that the defendant is, and at all times hereinafter mentioned was, a corporation incorporated under the laws of the State of California and a citizen and a resident of the State of California; that the defendant is, and at all times hereinafter mentioned was, duly qualified and authorized to do business in the State of Arizona and doing business in the State of Arizona; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00);

II.

That the plaintiffs are now, and at all times hereinafter mentioned were, husband and wife; [9]

III.

That on and prior to the 11th day of December, 1942, and ever since said time, the defendant was and has been operating bus lines as a common carrier for the transportation of passengers for hire in and through various states of the United States, including Arizona and California, and on and before said day was operating, and now operates, busses between the cities of Phoenix, Arizona, and Los Angeles, California, and elsewhere in and through said states.

IV.

That on the 10th day of December, 1942, the plaintiff, Zoa H. Zane, at Phoenix, Arizona, purchased from the defendant a ticket for the transportation of said plaintiff by the defendant from Phoenix, Arizona, to Los Angeles, California, and became a passenger for hire on one of defendant's busses; that said bus, in which said plaintiff was such passenger, left Phoenix, Arizona, the evening of December 10th, 1942, and that on the 11th day of December, 1942, while the plaintiff, Zoa H. Zane, was such passenger in said bus in the County of Riverside, State of California, on Highway 99, approximately Sixteen (16) miles west of the city limits of Indio, California, the defendant and the agent, servant and employee of the defendant, one Russell Douglas, who was then and there driving

and operating said bus and acting within the scope of his employment as such agent, servant and employee, so negligently and carelessly drove, managed and operated said passenger bus along and over said Highway aforesaid as to cause the same to collide with a truck then and there being driven in the same direction as said bus, and that by reason of said negligence and carelessness of the defendant, and its said agent, servant and employee, and each of them, and as a direct and proximate result thereof, the plaintiff, Zoa H. Zane, sustained the injuries hereinafter set forth; [10]

V.

That as a result of said carelessness and negligence the right foot and lower portion of the right leg of the plaintiff, Zoa H. Zane, were so badly bruised, smashed, injured and damaged as to necessitate the amputation of the right leg of said plaintiff below the knee; that the neck of the right femur or thigh bone of said plaintiff was fractured which resulted in a non-union of the broken parts of said femur or thigh bone, and in a non-union of said femur or thigh bone with the hip bone; that, as a result of said fracture and non-union, there is and will permanently continue to be a total non-functioning right-lower extremity of said plaintiff so far as weight bearing is concerned, and said plaintiff has been and will continue to be caused great discomfort, pain, suffering, inconvenience, and disfigurement, and will be forced at all times to use crutches, and will be wholly unable at any

time to use an artificial limb, or to walk or use her right leg.

VI.

That by reason of said fracture of said right femur or thigh bone, plaintiffs have been obliged to incur and pay and have incurred and paid expenses as follows: Doctors' bills, \$200; Hospital bills, \$185; Medical expenses, \$300; Assistance at home of plaintiffs, \$720; and X-rays, \$160, or a total of \$1,565.00; and that the plaintiffs will be required to incur and pay further expenses for medical care and treatment;

VII.

That as a result of said fracture of said right femur and the said resulting non-unions, hereinbefore set forth, which were directly and proximately caused by said carelessness and negligence of the defendant, and of its said agent, servant and employee, the plaintiff, Zoa H. Zane, has suffered and will continue to suffer great pain, anguish, distress, discomfort, [11] inconvenience and disfigurement, and that said plaintiff has been, is, and will be unable to support her weight, or to use an artificial limb, or to walk without the use of crutches, and has been, is, and will be unable to perform duties as a housewife, or to engage in any gainful pursuit, or to take care of her children or to bear children, or to be a normal wife; that at the time of said accident, said plaintiff, Zoa H. Zane, was 23 years of age and was in excellent health, and had a long life expectancy; that at said time said plain-

tiff was capable of earning approximately \$150 per month; and that, had it not been for said injury to said right femur, and the results and consequences thereof, said plaintiff could and would have earned from \$150 to \$200 per month; that by reason of said injury to said right femur, the plaintiffs, in addition to the special damages above set forth, have suffered and sustained general damages in the sum of \$50,000.

Wherefore, plaintiffs pray that the plaintiffs have and recover of and from the defendant the sum of \$51,565, together with their costs herein incurred.

SECOND CAUSE OF ACTION AND STATEMENT OF CLAIM

I.

Plaintiffs here repeat, reiterate and adopt by reference, each and every, all and singular, the allegations contained in paragraphs numbered I, II, III, IV, and V of the foregoing first cause of action and statement of claim as a part of this second cause of action and statement of claim, the same as though said allegations were here set forth in full.

II.

That immediately after the occurrence of the accident and injuries to the plaintiff, Zoa H. Zane, above set forth, she was taken to a hospital at Indio, California, where her right leg was amputated below the knee; that very shortly thereafter the claim

agent of the defendant called upon said plaintiff at said hospital and then and thereafter at other times advised said plaintiff that the Doctor who had amputated said leg of plaintiff, and who was in attendance upon said plaintiff, was the defendant's Doctor, and that the defendant would pay said Doctor for his services to said plaintiff, and would take care of all hospital and other medical bills, at said hospital, which was done by the defendant; that said claim agent of the defendant further advised said plaintiff that said Doctor was a good and capable Doctor, and that said plaintiff could depend and rely upon what said Doctor might tell her in regard to her injuries and condition; that said Doctor was in daily attendance upon said plaintiff at said hospital, and that said claim agent visited said plaintiff at said hospital very frequently, and at all times assured the plaintiff as to the high degree of medical skill of said Doctor, and many times advised the plaintiff and caused the plaintiff to believe that she safely could rely upon the statements of said Doctor as to her injuries and condition; that at all said times and up to and at the time of the settlement hereinafter mentioned said claim agent, and said Doctor in treating and attending said plaintiff, were the agents of, and acting for, defendant.

III.

That at all times while said plaintiff, Zoa H. Zane, was in said hospital she was in a very weak, nervous and worried condition as the result of said injuries and said amputation, and that said claim

agent and said Doctor gained the confidence of said plaintiff, and that the plaintiff relied upon and believed [13] the statements of said claim agent and said Doctor; that said claim agent and said Doctor on many occasions at said hospital falsely stated and represented to said plaintiff that her only injury was the injury to the right foot and lower right leg of said plaintiff, which necessitated the amputation of the leg of said plaintiff below the knee, and further falsely represented and stated to said plaintiff that she had not sustained any other injuries in, or by reason of, said accident, and that the plaintiff would be able to use an artificial limb on said right leg, thus avoiding the use of crutches, and that said plaintiff would be able to walk without crutches, and that in due course said plaintiff would be able to use said artificial limb and could walk, dance, and engage in all other activities to practically the same extent as though she still had her natural leg and foot, and that the plaintiff would have or experience very little, if any, pain, discomfort or inconvenience; that said plaintiff, having explicit confidence in said Doctor and said claim agent, believed said statements and representations to be true, and relied entirely thereon; that all of said representations and statements were wholly false and untrue, and either were made by said Doctor and said claim agent, who then and there were the agents of the defendant, knowing the same to be false and untrue, or were made recklessly and without regard as to their truth or falsity, and with a full means of knowledge of their

falsity; that, as alleged in paragraphs V and VII of the foregoing first cause of action and statement of claim, which allegations are here adopted by reference, in addition to the injury to her right foot and lower right leg below the knee, which necessitated the said amputation, said plaintiff, Zoa H. Zane, in and as a result of said accident sustained a fracture of the neck of her right femur or thigh bone, with the results alleged in said paragraphs, which allegations are hereby adopted [14] by reference.

IV.

That several weeks after said accident, said claim agent of the defendant took up with the plaintiff, Zoa H. Zane, at said hospital the matter of a settlement of her claim against the defendant by reason of said accident and the injuries to the right foot and lower right leg of the plaintiff below the knee, which necessitated the said amputation, and that at said time and thereafter said claim agent and said Doctor on many occasions importuned and urged said plaintiff to agree upon a settlement of said claim; that thereafter said plaintiff, Zoa H. Zane, and the plaintiff, Jack Zane, agreed with the defendant, through its said claim agent, upon a settlement of said claim for said injuries below the knee, at and for the sum of \$14,500, which said sum was paid to the plaintiffs by the defendant; and that the defendant, through its said claim agent, took and received from the plaintiffs a general release purporting to release and discharge the de-

fendant from any and all claims and demands of the plaintiffs on account of said accident.

V.

That at the time of the execution of said release, and many times prior thereto, said Doctor and claim agent of the defendant made the false representations and statements to the plaintiffs regarding the injuries and condition of the plaintiff, Zoa H. Zane, that are above set forth, and positively represented and stated to the plaintiffs that no injuries had been sustained by the plaintiff except said injuries to her lower right leg and foot as above described; that immediately prior to said settlement said claim agent and said Doctor advised the plaintiffs that they did not need any independent, legal or other advice, and that a better settlement could be made without the same; [15] that neither at the time of said settlement and the execution and delivery of said release, nor at any time prior thereto, nor for a long time subsequent thereto, did the plaintiffs, or either of them, have any knowledge whatsoever of, or suspect the existence of, said fracture of the femur or thigh bone of the plaintiff, Zoa H. Zane, or of any injury whatsoever thereto, or of any of the consequences thereof; and that said release was executed and delivered in complete ignorance of the plaintiffs, and each of them, of such injury and in complete reliance upon the representations and statements aforesaid regarding the injury sustained by the plaintiff, and the results thereof; that neither the said fracture of said right femur or thigh bone, nor the results

or consequences thereof, became known to the plaintiffs until long after said settlement and the execution and delivery of said release; that if said fracture or the results or consequences thereof had been known to the plaintiffs, or either of them, this would have materially affected their said settlement with the defendant, and that the plaintiffs, for said amount, would not have executed a release purporting to cover and extend to any and all claims of the plaintiffs, if said fracture, or the results or consequences thereof, had been known or suspected by them; that at the time of the execution of the said release, both the plaintiffs were ignorant of their legal rights and were wholly inexperienced as to legal instruments or affairs, and that the plaintiff, Zoa H. Zane, was in a weak and nervous condition; that by reason of this and by reason of the false representations and statements of the agents of the defendant aforesaid, the plaintiffs were led to believe, and did believe, that said release did not apply or extend to anything except the injury to said right foot and lower right leg of said plaintiff, and the amputation thereof, which they had been assured was the only injury sustained in or caused by said [16] accident as aforesaid, and that the claim of the plaintiffs by reason of said injury was the only claim that was being discharged or released by said release.

VI.

That prior to and at the time of said accident, and ever since said time it was and has been and now is provided in and by the statutes of the State

of California, Section 1542 of the Civil Code of California, as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

That in and by the decisions of the Supreme Court of the State of California, being the court of last resort of said State, construing said section, it has been and is decided and held that a release executed by one who has sustained injuries does not extend to or cover the injuries not known or suspected to exist at the time of such release, but extends to and covers only such injuries as were known or suspected to exist at such time and stands as the agreement of the parties as to such known injuries only; that in and by the decisions of said Court it has been and is decided and held that where, at the time of the execution of such release, there are known and unknown injuries no rescission of such release and no offer to restore or restoration of the consideration paid therefor is necessary in order to recover on account of injuries not known or suspected to exist at the time of the execution of such release.

VII.

That the plaintiffs have not been and are not able to tender or repay the consideration which the plaintiffs received from the defendant in the settlement of said injuries known to them [17] at the

time of said settlement for the reason that the plaintiffs did not learn or know that there had been any injuries to the femur or thigh bone of said plaintiff, Zoa H. Zane, until long after said settlement was made; that this condition was brought about by the defendant, its agents and servants, in falsely representing to the plaintiffs that there were no injuries other than the injuries to the right foot and the right leg below the knee; that, by reason of the conduct of the defendant, its agents and servants, in making said representations as herein alleged, the plaintiffs have been and are unable to tender or repay to the defendant the consideration received in settlement of the injuries known at the time said settlement was made; that the plaintiffs were compelled to spend a large portion of the money received from said settlement for medical, hospital, X-rays, nursing, and other expenses in trying to heal or cure said injury of said fractured femur, and had spent other portions of said money in other ways before learning of said injury; that said condition of plaintiffs being unable to tender or repay the defendant the sum of money received in said settlement was and has been due to the said conduct of the defendants, its agents and servants, as herein alleged.

VIII.

That by reason of said fracture of said right femur or thigh bone plaintiffs have been obliged to incur and pay and have incurred and paid expenses as follows: Doctors' bills, \$200; Hospital bills, \$185; Medical expenses, \$300; Assistance at home of plain-

tiffs, \$720; and X-rays, \$160, or a total of \$1,565; and that the plaintiffs will be required to incur and pay further expenses for medical care and treatment;

IX.

That as a result of said fracture of said right femur and the resulting non-unions, hereinbefore set forth, which the [18] plaintiffs did not know or suspect to exist at the time of the execution and delivery of said release, and which was a direct and proximate result of the said carelessness and negligence of the defendant and of its said agent, servant and employee, the plaintiff, Zoa H. Zane, has suffered, and will continue to suffer, great pain, anguish, distress, discomfort, inconvenience and disfigurement, and has been, is, and will be unable to support her weight, or to use an artificial limb, or to walk without the use of crutches, and has been, is, and will be unable to perform duties as a housewife, or to engage in any gainful pursuit, or to take care of her children, or to bear children, or to be a normal wife; that at the time of said accident, said plaintiff, Zoa H. Zane, was 23 years of age and was in excellent health, and had a long life expectancy; that at said time said plaintiff was capable of earning approximately \$150 per month; and that, had it not been for said injury to said right femur, said plaintiff could and would have earned from \$150 to \$200 per month; that, by reason of said injury to said right femur and the said non-unions resulting therefrom, the plaintiffs, in addition to the special damages above set forth, have suf-

fered and sustained general damages in the sum of \$50,000.

Wherefore, plaintiffs pray that the plaintiffs have and recover of and from the defendant the sum of \$51,565, together with their costs herein incurred.

THIRD CAUSE OF ACTION AND STATEMENT OF CLAIM

I.

Plaintiffs here repeat, reiterate, and adopt by reference, each and every, all and singular, the allegations contained in paragraphs numbered I, II, III, IV, and V of the foregoing [19] first cause of action and statement of claim as a part of this third cause of action and statement of claim, the same as though said allegation were here set forth in full.

I.

That immediately after the occurrence of said accident and injuries to said plaintiff, Zoa H. Zane, above set forth, said plaintiff was taken to a hospital at Indio, California where her right leg was amputated below the knee; that very shortly thereafter the claim agent of the defendant called upon said plaintiff at said hospital, and that thereafter said claim agent of the defendant took up with the plaintiff, Zoa H. Zane, the matter of a settlement of the claim of the plaintiffs against the defendant by reason of said accident; that a settlement was thereafter agreed upon between the defendant, acting through said claim agent, and the plaintiffs un-

der which the defendant paid to the plaintiffs the sum of \$14,500, and took and received a general release from the plaintiffs purporting to release and discharge the defendant from any and all claims and demands of the plaintiffs on account of said accident.

III.

That neither at the time of said settlement and the execution and delivery of said release, nor at any time prior thereto, nor for a long time subsequent thereto, did the plaintiffs, or either of them, have any knowledge whatsoever of, or suspect the existence of, said fracture of the femur or thigh bone of said plaintiff, Zoa H. Zane, or of any injury whatsoever thereto, or of any of the consequences thereof, and that said release was executed and delivered in complete ignorance of the plaintiffs, and each of them, of any such injury; that at and prior to the time of the execution and delivery of said release, the said claim agent of the defendant and the Doctor in charge and in care of the plaintiff, Zoa H. Zane, at said hospital, stated [20] and represented to the said plaintiffs that her only injury was the injury to the right foot and lower right leg of said plaintiff, which necessitated the amputation of said leg of said plaintiff below the knee, and that said plaintiff had sustained no other injury whatsoever in or as a result of said accident, and that in due course after said accident, said plaintiff would be able to use an artificial limb on said right leg, thus avoiding the use of crutches, and that said plaintiff would be able to walk and

engage in all other activities to practically the same extent as though she still had her natural leg and foot, and that the plaintiff would have and experience very little, if any, pain, discomfort or inconvenience; that either the said fracture of and injury to the femur or thigh bone of said plaintiff was unknown to the defendant, and its said agents, or that the defendant and said agents concealed the same from the plaintiffs, and led the plaintiffs to believe that the only injury was the said injury to the right foot and lower right leg of said plaintiff, Zoa H. Zane; that said fracture of said right femur or thigh bone, and the results and consequences thereof, became known to the plaintiffs long after said settlement and the execution and delivery of said release; that if said fracture, or the results and consequences thereof, had been known to the plaintiffs, or either of them, this would have materially affected their said settlement with the defendant, and that the plaintiffs would not for said amount have executed a release purporting to cover and extend to any and all claims of the plaintiff if said fracture, or the results or consequences thereof, had been known or suspected by them.

IV.

That prior to and at the time of said accident, and ever since said time, it was and has been and now is provided in and by the statutes of the State of California, Section 1542 of the [21] Civil Code of California, as follows:

“A general release does not extend to claims

which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

That in and by the decisions of the Supreme Court of the State of California, being the court of last resort of said State, construing said section, it has been and is decided and held that a release executed by one who has sustained injuries does not extend to or cover injuries not known or suspected to exist at the time of such release, but extends to and covers only such injuries as were known or suspected to exist at such time and stands as the agreement of the parties as to such known injuries only; that in and by the decisions of said Court it has been and is decided and held that where, at the time of the execution of such release, there are known and unknown injuries, no rescission of such release and no offer to restore or restoration of the consideration paid therefor is necessary in order to recover on account of injuries not known or suspected to exist at the time of the execution of such release.

V.

That the plaintiffs have not been and are not able to tender or repay the consideration which the plaintiffs received from the defendant in the settlement of the injuries known to them at the time of said settlement, for the reason that plaintiffs did not learn or know that there had been any injury to the femur or thigh bone of said plaintiff, Zoa

H. Zane, until long after said settlement was made, and that the plaintiffs were compelled to spend a large portion of the money received from said settlement for medical, hospital, X-rays, nursing and other expenses in trying to heal or cure said injury of said [22] fractured femur, and had spent other portions of said money in other ways before learning of said injury.

VI.

That by reason of said fracture of said right femur or thigh bone, plaintiffs have been obliged to incur and pay and have incurred and are paid expenses as follows: Doctors' bills, \$200; Hospital bills, \$185; Medical expenses, \$300; Assistance at home of plaintiffs, \$720; and X-rays, \$160, or a total of \$1,565; and that the plaintiffs will be required to incur and pay further expenses for medical care and treatment;

VII.

That as a result of said fracture of said right femur and the resulting non-unions hereinbefore set forth, which the plaintiffs did not know or suspect to exist at the time of the execution and delivery of said release, and which was a direct and proximate result of the said carelessness and negligence of the defendant and of its said agent, servant and employee, the plaintiff, Zoa H. Zane, has suffered, and will continue to suffer, great pain, anguish, distress and discomfort, inconvenience and disfigurement, and has been, is, and will be unable to support her weight, or to use an artificial limb, or to

walk without the use of crutches, and has been, is, and will be unable to perform duties as a house-wife, or to engage in any gainful pursuit, or to take care of her children, or to bear children, or to be a normal wife; that at the time of said accident, said plaintiff, Zoa H. Zane, was 23 years of age and was in excellent health, and had a long life expectancy; that at said time said plaintiff was capable of earning approximately \$150 per month; and that, had it not been for said injury to said right femur, said plaintiff could and would have earned from \$150 to \$200 per month; that, by reason of said injury to said right femur and the said non-unions resulting therefrom, [23] the plaintiffs, in addition to the special damages above set forth, have suffered and sustained general damages in the sum of \$50,000.

Wherefore, plaintiffs pray that the plaintiffs have and recover of and from the defendant the sum of \$51,565.00, together with their costs herein incurred.

TERRENCE A. CARSON.
STAHL & MURPHY.

By FLOYD M. STAHL.
JOHN A. MURPHY,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 9, 1944. [24]

[Title of District Court and Cause.]

ANSWER

ANSWER TO FIRST CAUSE OF ACTION

Comes Now the defendant and answering the First Cause of Action set forth in the plaintiff's complaint filed herein, admits, denies and alleges as follows:

FOR A FIRST DEFENSE

I.

Answering Paragraph I of said First Cause of Action, Defendant admits all averments therein contained.

II.

Answering Paragraph II of said First Cause of Action, defendant admits all averments therein contained.

III.

Answering Paragraph III of said First Cause of Action, defendant admits all averments therein contained.

IV.

Answering Paragraph IV of said First Cause of Action, defendant admits that on or about the 10th day of December, 1942, the plaintiff, Zoa H. Zane of Phoenix, Arizona, purchased from the defendant a ticket for the transportation of said plaintiff by defendant from Phoenix, Arizona, to Los Angeles, California, and became a passenger for hire on one of defendant's busses. Defendant

denies generally and specifically each and every [25] allegation in said Paragraph IV contained save and except the allegations hereinbefore expressly admitted.

V.

Answering Paragraph V of said First Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

VI.

Answering Paragraph VI of said First Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

VII.

Answering Paragraph VII of said First Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

FOR A SECOND DEFENSE

Not admitting any of the allegations of the complaint hereinbefore denied, but for a separate and distinct defense to said First Cause of Action, defendant alleges:

That if there was an accident and plaintiffs, or one of them, was injured and damaged as alleged in said First Cause of Action, that on or about the 19th day of February, 1943, for a valuable and adequate consideration, to-wit, the sum of \$15,967.00 lawful money of the United States, in hand paid to the said plaintiffs and then and there received and accepted by the said plaintiffs, the said plaintiffs,

and each of them, did fully release and discharge the said defendant of and from all claims, demands, injuries, damages, matters and things set forth in said First Cause of Action, which said release and discharge was in writing and in words and figures as follows:

“RELEASE IN FULL

Received of Pacific Greyhound Lines the sum of Fifteen thousand nine hundred, Sixty-seven and no/100 Dollars (\$15,967.00), in consideration of [26] which sum we hereby release and discharge Pacific Greyhound Lines of and from any and all claims and demands which we now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at Point on U. S. Highway # 99 near Indio, California resulting in personal injury and property damage.

It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

Dated at Indio, California, this 19 day of February, 1943.

ZOA ZANE (L.S.)

JACK ZANE (L.S.)

M. D. CAMERON,
Witness.

ALPHA R. MARCUM,
Witness.

This release should not be signed unless read by or read to the person signing same."

ANSWER TO SECOND CAUSE OF ACTION

Comes Now the defendant and answering the Second Cause of Action of the complaint on file herein admits, denies and alleges as follows:

FOR A FIRST DEFENSE

I.

Answering Paragraph I of said Second Cause of Action, defendant refers to the answers of defendant to paragraphs numbered I, II, III, IV and V of the First Cause of Action, and repeats, reiterates and adopts by reference the answers to said paragraphs of said First Cause of Action as the answer to Paragraph I of this, the Second Cause of Action.

II.

Answering Paragraph II of said Second Cause of Action, defendant admits that after the accident

described in said Second Cause of Action the plaintiff, Zoa H. Zane was taken to a hospital at Indio, California, and her right leg was [27] amputated below the knee. Defendant denies, generally and specifically, each and every allegation in said Paragraph II of said Second Cause of Action contained save and except the allegations hereinbefore expressly admitted.

III.

Answering Paragraph III of said Second Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph IV of said Second Cause of Action of said complaint, defendant admits that for a valuable consideration the plaintiffs executed and delivered to the defendant a full release and discharge, releasing and discharging the defendant from any and all claims and demands of the plaintiffs on account of the accident described in the said Second Cause of Action. Defendant denies that said release and discharge was merely a general release but alleges in such behalf that said release was specific and detailed. Defendant denies generally and specifically each and every allegation in said Paragraph IV of said Second Cause of Action contained, save and except the allegations of said paragraph hereinbefore expressly admitted.

V.

Answering Paragraph V of said Second Cause

of Action, defendant denies, generally and specifically, each and every allegation therein contained.

VI.

Answering Paragraph VI of said Second Cause of Action, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averment to the effect that there is and was a statute of the State of California known as Section 1542 of the Civil Code of California [28] reading as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

Defendant denies generally and specifically each and every allegation in said paragraph VI of said Second Cause of Action contained save and except the allegations of said paragraph hereinbefore expressly admitted.

VII.

Answering Paragraph VII of said Second Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

VIII.

Answering Paragraph VIII of said Second Cause of Action defendant denies generally and specifically each and every allegation therein contained.

IX.

Answering Paragraph IX of said Second Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

FOR A SECOND DEFENSE

Now Comes the defendant, and not admitting any of the allegations of the complaint hereinbefore denied, but for a separate and distinct defense to said Second Cause of Action, refers to, reiterates and restates and adopts by reference all of the allegations and averments contained in the Second Defense to the First Cause of Action of the Complaint, as a second defense to this, the Second Cause of Action.

ANSWER TO THIRD CAUSE OF ACTION

Comes Now the defendant and answering the Third Cause of Action of the Complaint on file herein, admits, denies and [29] alleges as follows:

FOR A FIRST DEFENSE**I.**

Answering Paragraph I of said Third Cause of Action, defendant refers to the answers to paragraphs numbered I, II, III, IV and V of the First Cause of Action, and repeats, reiterates and adopts by reference the answers to said paragraphs of said First Cause of Action as the answer to Paragraph I of this, the Third Cause of Action.

II.

Answering paragraph II of said Third Cause of Action, defendant admits that after the occurrence of the accident set forth in said Third Cause of Action, the plaintiff, Zoa H. Zane, was taken to a hospital at Indio, California, and her right leg was amputated below the knee, and admits that thereafter for a valuable consideration, the plaintiffs executed and delivered to the defendant a full release and discharge, releasing and discharging the defendant from any and all claims and demands of the plaintiffs on account of the accident described in the said Third Cause of Action. Defendant denies that said release was merely a general release but alleges that said release was specific and detailed. Defendant denies, generally and specifically, each and every allegation in said Paragraph II of said Third Cause of Action contained, save and except the allegations of said paragraph hereinbefore expressly admitted.

III.

Answering Paragraph III of said Third Cause of Action, defendant denies generally and specifically each and every allegation in said paragraph contained.

IV.

Answering Paragraph IV of said Third Cause of Action, defendant alleges that it is without knowledge or information [30] sufficient to form a belief as to the truth of the averment to the effect that there is and was a statute of the State of Califor-

nia known as Section 1542 of the Civil Code of California reading as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Defendant denies generally and specifically each and every allegation in said paragraph IV of said Third Cause of Action contained, save and except the allegations of said paragraph hereinbefore expressly admitted.

V.

Answering Paragraph V of said Third Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

VI.

Answering Paragraph VI of said Third Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

VII.

Answering Paragraph VII of said Third Cause of Action, defendant denies generally and specifically each and every allegation therein contained.

FOR A SECOND DEFENSE

Now Comes the defendant, and not admitting any of the allegations of the complaint hereinbefore

denied, but for a separate and distinct defense to said Third Cause of Action, defendant refers to, reiterates and restates and adopts by reference all of the allegations and averments contained in the Second Defense to the First Cause of Action of the complaint as a second defense to this, the Third Cause of Action. [31]

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that defendant recover its costs in this case expended or incurred.

BAKER & WHITNEY.

By ALEXANDER B. BAKER,
Attorneys for Defendant.

Receipt of Copy Acknowledged this 20th day of January, 1945.

TERRENCE A. CARSON.
STAHL & MURPHY.

By TERRENCE A. CARSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 20, 1945. [32]

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Thursday, May 17, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly this day for trial.

Terrence Carson, Esquire, and Floyd Stahl, Esquire, are present on behalf of the plaintiffs and Alexander B. Baker, Esquire, and Harold Whitney, Esquire, are present on behalf of the defendant.

Both sides announce ready for trial.

A lawful jury of twelve men is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all Jurors not empaneled in the trial of this case be excused to the further order of this Court.

Floyd Stahl, Esquire, now reads the plaintiffs' complaint to the Jury.

Alexander B. Baker, Esquire, now reads the defendant's answer to the Jury.

Terrence Carson, Esquire, makes the plaintiffs' opening statement to the Jury.

Alexander B. Baker, Esquire, reserves the defendant's statement until the close of the plaintiffs' case.

Plaintiffs' Case:

Zoa H. Zane is now sworn and examined on behalf of the plaintiffs.

Thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Zoa H. Zane is now recalled and further examined for the plaintiffs.

Plaintiffs' Exhibit One, receipt, is now admitted in evidence.

Plaintiffs' Exhibit Two, cancelled check, is now admitted in evidence.

Defendant's Exhibit A, telegram, is now admitted in evidence.

Defendant's Exhibit B, release, is now admitted in evidence.

Defendant's Exhibit C, Voucher, is now admitted in evidence. [35]

Defendant's Exhibit D, voucher, is now admitted in evidence.

Dr. J. Lytton-Smith is now sworn and examined on behalf of the plaintiffs.

Plaintiff's Exhibit Three, X-ray, is now admitted in evidence.

Plaintiff's Exhibit Four, X-ray, is now admitted in evidence.

Zoa H. Zane is now recalled and further examined on behalf of the plaintiffs.

Defendant's Exhibit E, release form, is now admitted in evidence.

Plaintiffs' Exhibit Five, Bill, is now admitted in evidence.

Plaintiffs' Exhibit Six, Bill, is now admitted in evidence.

And thereupon, at the hour of 4:40 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of ten o'clock a.m., Friday, May 18, 1945, to which time the Jury, being first duly admonished by the Court, the parties and their respective counsel are excused.

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Friday, May 18, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

The Jury and all members thereof, the parties
and counsel being present pursuant to recess, fur-
ther proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Zoa H. Zane is now recalled and further exam-
ined on behalf of the plaintiffs.

Jack Zane is now sworn and examined on behalf
of the plaintiffs.

Dr. Lytton-Smith is now recalled and further
examined on behalf of the plaintiffs.

Plaintiffs' Exhibit Eight, X-ray, is now admitted
in evidence.

Plaintiffs' Exhibit Nine, X-ray, is now admit-
ted in evidence.

Plaintiffs' Exhibit Ten, X-ray, is now admitted
in evidence.

Plaintiff's Exhibit Eleven, X-ray, is now admit-
ted in evidence. [36]

Jack Zane, heretofore sworn, is now recalled and
further examined on behalf of plaintiffs.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and their counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and their counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Jack Zane is now recalled and further examined for the plaintiffs.

Charles B. Palmer is now sworn and examined on behalf of the plaintiffs.

Zoa H. Zane is now recalled and further examined on behalf of the plaintiffs.

The defendant's Exhibits K, L, N, O, P, T, S, R, U, V, W, X, Y, and Z, checks, are now admitted in evidence.

The defendant's Exhibits AB and AC, checks, are now admitted in evidence.

The defendant's Exhibit AD, bank statements, are now admitted in evidence.

Plaintiffs' Exhibit Twelve, receipt, is now admitted in evidence.

Whereupon, the plaintiffs rest.

The Jury is now duly admonished by the Court and excused to Saturday, May 19, 1945, at the hour of ten o'clock a.m.

The defendant now moves the Court to instruct the Jury to return a verdict for the defendant upon the ground and for the reason that the plaintiffs have failed to adduce testimony sufficient to constitute a cause of action against the defendant. Said motion is now duly argued by respective counsel.

And thereupon, at the hour of 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 10:00 o'clock a.m., Saturday, May 19, 1945, to which time the parties and their counsel are excused. [37]

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Saturday, May 19, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

The Jury, and all members thereof, the parties and their counsel being present pursuant to recess, further proceedings of trial are had as follows:

Thereupon, the Jury is now duly admonished by the Court and excused to Monday, May 21, 1945, at the hour of two o'clock p.m.

The defendant's motion for a directed verdict is now further argued by respective counsel. Said motion is now submitted and by the Court taken under advisement.

And thereupon, at the hour of 11:00 o'clock a.m., It Is Ordered that the further trial of this case be continued to the hour of 2:00 o'clock p.m., Monday, May 21, 1945, to which time the parties and their counsel are excused.

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Monday, May 21, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

At the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

It Is Ordered that the defendant's Motion for a Directed Verdict for the defendant be and it is denied.

Defendant's Case:

Frazee Burte is now sworn and examined for the defendant.

Earl J. Parkes is now sworn and examined for the defendant.

Defendant's Exhibit AE is now admitted in evidence.

Defendant's Exhibit AF, deposition of Blackman and Payne, is now admitted and read in evidence to the Jury.

Defendant's Exhibit AG, deposition of Alpha Marcum, is now admitted and read in evidence to the Jury.

And thereupon, at the hour of 4:40 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 10:00 o'clock a.m., Tuesday, May 22, 1945, to which time the Jury, being first duly admonished by the Court, the parties and their counsel are excused. [38]

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Tuesday, May 22, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

The Jury, and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Zoa H. Zane is now called and examined on behalf of the defendant.

Defendant's Exhibit AH, check, is now admitted in evidence.

Defendant's Exhibit AI, check, is now admitted in evidence.

Defendant's Exhibit AJ, check, is now admitted in evidence.

Defendant's Exhibit AK, check, is now admitted in exhibit.

And the defendant rests.

Rebuttal:

The American Experience Table of Mortality is now read to the Jury.

Thereupon, the plaintiffs rest.

Both sides rest.

The Jury is now duly admonished by the Court and excused to the hour of two o'clock p.m., this date.

The defendant moves for a verdict directed for the defendant and said motion is now argued by respective counsel.

It Is Ordered that said motion be and it is denied.

And thereupon, at the hour of 11:20 o'clock a.m.,
It Is Ordered that the further trial of this case be

continued to the hour of 2:00 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and their counsel are excused.

Subsequently, at the hour of 2:00 o'clock p.m., the Jury and all members thereof, the parties hereto and their counsel being present pursuant to recess, further proceedings of trial are had as follows:

All the evidence being in, the case is argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at the hour of 4:30 o'clock p.m. in charge of two sworn bailiffs to consider of their verdict.

Louis Billard is present as Court Reporter.

It Is Ordered that the Marshal defray the expenses of the Jury and their bailiffs during the period of deliberation. [39]

Subsequently, counsel for both parties being present, the Jury return in a body into open Court at the hour of 10:45 o'clock p.m., and all members thereof being present are asked if they have agreed upon a verdict. Whereupon, the Foreman reports

that they have agreed and presents the following verdict, to-wit:

“Civ-642

ZOA H. ZANE and JACK ZANE, her husband,

Plaintiffs,

Against

PACIFIC GREYHOUND LINES, a corporation,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs and assess their damage at \$10,000.00.

E. P. KETCHIE,
Foreman.”

The verdict is read as recorded and no poll being desired by either side, the Jury is discharged from the further consideration of this case.

On motion of Terrence A. Carson, Esquire,
It Is Ordered that plaintiffs have judgment in accordance with the verdict. [40]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY PLAINTIFFS

PLAINTIFFS' REQUESTED INSTRUCTION No. 1

The Court instructs the jury that a carrier of passengers is required to exercise the highest degree

of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care, and if you find that while the plaintiff, Zoa H. Zane, was being carried as a passenger by the defendant, Pacific Greyhound Lines, the bus upon which she was a passenger collided with a truck traveling ahead of said bus and in the same direction and that said plaintiff sustained injuries as a result of such collision, then a presumption of negligence arises which throws upon the defendant, Pacific Greyhound Lines, the burden of showing that the injuries were sustained without any negligence on its part, and in the absence of such evidence your finding should be that the accident and injuries to the plaintiff, Zoa H. Zane, were caused by the negligence of the defendant.

139 Pac. 73 (Cal.)

Given. [42]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 2

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that, prior to the execution of the release introduced in evidence, an agent or agents of the defendant represented to the plaintiff, Zoa H. Zane, that her only injury was the injury to her right foot and lower right leg, which necessitated the amputation of said leg below the knee, and that she had not sus-

tained any other injuries, and that she would be able to use an artificial limb and avoid the use of crutches, and if you further find from a preponderance of the evidence that said representations were not true and that plaintiffs believed the same and relied thereon, and that had it not been for such representations and such belief and reliance, the plaintiffs would not have executed said release, then, although said agent or agents did not know that said representations were not true at the time they were made, and although there was no fraud or wrongful intent on the part of said agent or agents to deceive or defraud said plaintiff, the plaintiffs are not bound by said release so far as the injuries to the right femur or thigh bone of said plaintiff, Zoa H. Zane, and the results and consequences thereof, are concerned, and the plaintiffs can recover for such injuries and the results and consequences thereof if you find from a preponderance of the evidence that the negligence of the defendant was the proximate cause of said injuries.

Given. [43]

PLAINTIFFS' REQUESTED INSTRUCTION No. 3

You are instructed that if you find from the evidence that the claim agent of the defendant, prior to the execution of the release relied on by the defendant, represented to the plaintiff, Zoa H. Zane, that said plaintiff had sustained no injury except the injury to her right foot and lower leg, and that

she could use an artificial limb and that such representation was not true and that said representation was believed and relied upon by the plaintiffs, then said release is no defense to this action and your verdict should be for the plaintiffs for such damages as you find the plaintiffs have sustained on account of the injury to her right femur or thigh bone of the plaintiff, Zoa H. Zane, if you find such injury was proximately caused by the negligence of the defendant.

Refused. [44]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 4

The Court instructs the jury that, if you find that the negligence of the defendant was the proximate cause of injuries to the plaintiff, then there was a legal obligation imposed by law upon the defendant to furnish such plaintiff reasonable hospital and medical care and treatment and in such event the defendant cannot be heard to say that such care and treatment was unauthorized.

Refused. [45]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 5

The Court instructs the jury that if you find from the evidence that, prior to the execution of the release introduced in evidence, Dr. Blackman represented to the plaintiff, Zoa H. Zane, that the only

injuries she had sustained as a result of the accident were the injuries to her right lower leg and foot that necessitated the amputation, and that said plaintiff could use an artificial limb, and if you further find from the evidence that said representations were not true and that said plaintiff, as a result of said accident, sustained a fracture of her right femur or thigh bone resulting in a non-union of said bone with the hip bone, and that said plaintiff could not and cannot use an artificial limb, and if you further find that said representations were believed and relied upon by the plaintiffs, and if you further find that the claim agent of said defendant knew of, approved and ratified said representations, and that the defendant approved the settlement and accepted the benefits thereof, then the defendant is estopped from claiming that said representations cannot be attributed to it, and said release is not a bar to this action.

Given. [46]

**PLAINTIFFS' REQUESTED INSTRUCTION
No. 6**

The Court instructs the jury that if you find from a preponderance of the evidence that the claim agent of the defendant, prior to the signing by the plaintiffs of the release relied on by the defendant, had left with the plaintiff, Zoa H. Zane, a form of release in which the consideration was stated to be \$14,500 and in which the accident was stated to have resulted in the loss of said plaintiffs' right

foot and lower leg, and if you further find from the evidence that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff and that as a result said plaintiff signed said release introduced in evidence, then said release is no defense in this suit and your verdict should be for the plaintiffs for such damages as you may find the plaintiffs have sustained by reason of and as a result of the injury to the right femur or thigh bone of the plaintiff, Zoa H. Zane, if you further find from a preponderance of the evidence that the accident was caused by the negligence of the defendant and that such negligence was the proximate cause of said injury.

Given. [47]

**PLAINTIFFS' REQUESTED INSTRUCTION
No. 7**

The Court instructs the jury that if you find from the evidence that if, at the time of the execution of the release introduced in evidence, the plaintiffs did not have knowledge of, or suspect the existence of, the injury to the right femur or thigh bone of the plaintiff, Zoa H. Zane, and that the defendant had no knowledge of said injury, and, if you further find from the evidence that if said injury to said right femur or thigh bone had been known to the plaintiffs this must have materially affected their settlement with the defendant, then said re-

lease did not and does not extend to or cover said injury to said right femur or thigh bone or the results or consequences thereof, but only extended to and covered the injury to the right foot and lower leg of the plaintiff, Zoa H. Zane.

Withdrawn. [48]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 8

The Court instructs the jury that if you find from the evidence that, prior to the execution of the release introduced in evidence, Dr. Blackman represented to the plaintiff, Zoa H. Zane, that the only injuries she had sustained as a result of the accident were the injuries to her right lower leg and foot that necessitated the amputation, and that said plaintiff could use an artificial limb, and if you further find from the evidence that said representations were not true and that said plaintiff as a result of said accident sustained a fracture of her right femur or thigh bone resulting in a non-union of said bone with the hip bone, and that said plaintiff could not and cannot use an artificial limb, and if you further find that said representations were believed and relied upon by the plaintiffs, and if you further find that Dr. Blackman, at the time of making said representations, was the agent of the defendant, then said release is not a defense to this action.

Refused. [49]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 9

The Court instructs the jury that it is for you to decide whether representations were made by the defendant or its agents. In determining this I instruct you that direct evidence is not indispensable to prove agency, but that this may be shown by other facts and circumstances from which the agency may be properly inferred, such as the relations of the parties to each other and their conduct in reference to the subject matter involved in the case.

Given. [50]

PLAINTIFFS' REQUESTED INSTRUCTION
No. 10

The Court instructs you that if you find for the plaintiffs, then it is your duty to fix the amount of damages as shown by the evidence relative thereto. In fixing the amount of such damages, if any, you may take into consideration the age of the plaintiff, Zoa H. Zane, the extent of the injuries, if any, to the right femur or thigh bone of said plaintiff, and the results and consequences thereof, her physical and mental pain, suffering and inconvenience already endured, if any, and that she may endure in the future as a result of such injury, if any, and the character of such injury, whether temporary or permanent; you may also consider any reasonable expense incurred in the treatment of said injury

and her inability, if any, to work and earn money, and to perform her duties and to engage in gainful pursuits, and any impairment of her physical powers and any limitations placed upon her in the enjoyment of her physical faculties by reason of said injury, and allow such sum as will under the evidence compensate the plaintiffs for said injury, not, however, exceeding the sum of \$51,565, the amount asked for by the plaintiffs in their complaint.

Given.

[Endorsed]: Filed May 22, 1945. [51]

[Title of District Court and Cause.]

**INSTRUCTIONS REQUESTED BY
DEFENDANT**

INSTRUCTION No. 1

You are instructed to return a verdict for the defendant.

Refused. [53]

INSTRUCTION No. 2

You are instructed that the plaintiffs in this case assert and testify that at the time they signed and executed the written release which is in evidence they did not know that the plaintiff, Zoa Zane, had suffered injuries to her right hip and possibly other injuries and assumed that her only injury was the amputation of her right leg below the knee.

In this respect, you are instructed that the release in question contains, among other provisions, the following clause:

“It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.”

The plaintiff, Zoa Zane, knew generally when she signed the release what it meant and that its effect was to bar her right to sue for any injuries received by her in the bus accident in question although she did not know of or suspect such injuries, or if she attached her signature to said release carelessly and with indifference to her rights and without making any effort to determine the contents of said release, then the release must be upheld and the plaintiffs are precluded from recovering in this action unless you find from clear, convincing, and satisfactory evidence that the plaintiffs were induced to sign the release by intentional fraud and deceit on the part of the defendant as I have defined fraud and deceit in other instructions given you in this case.

So. Pac. Co. v. Gastelum (Ariz.), 283 Pac. 719. 45 Am. Jur. p. 684.

Berry v. Struble (Calif.), 66 Pac. (2d) 746. Refused. [54]

INSTRUCTION No. 3

You are instructed that the plaintiffs in their

complaint, among other things, charge that the written release in evidence was executed by the plaintiffs by reason of certain intentional false and fraudulent representations or concealment by the defendant or its agents. You are further instructed that the following elements are necessary to constitute intentional fraud on the part of any person:

(1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.

It is necessary, of course, that plaintiffs should prove all of these essentials as to any claim of intentional fraud. The nature and extent of the proof required depends to a great deal upon the relationships existing between defendant and plaintiffs. If they were dealing at arm's length, a greater degree of proof is required than if a confidential relationship existed between them.

Waddell v. White, 56 Ariz. 420; 108 Pac. (2d) 565.

Modified. [55]

INSTRUCTION No. 4

You are instructed that fraud on the part of any person is never presumed. It must be established by clear, convincing and satisfactory evidence. You

cannot find fraud to exist on a mere suspicion as to the possibility thereof.

Rice v. Tissow, 57 Ariz. 230; 112 Pac. (2d) 866.

Given. [56]

INSTRUCTION No. 5

You are instructed that the plaintiffs in this case contend that they were induced to execute the release in question by reason of false representations made to them that the plaintiff, Zoa Zane, had suffered no fractures from the bus accident except the fractures for which she was treated at the Indio Hospital. They further contend that such representations were false in that the plaintiff, Zoa Zane, in said bus accident had sustained a fracture of the femur of her right hip in addition to the fractures treated at the hospital.

You are further instructed that the burden is upon the plaintiffs to prove to your satisfaction by a preponderance of the evidence, that Zoa Zane did suffer a fracture of the femur of her right hip in said bus accident, and that such fracture existed at the time she was in the Indio Hospital, before you can give consideration to any other features of the case concerning the liability of the defendant, if any.

You are not permitted to presume that representations made to the plaintiffs, or either of them, were false merely because there is a possibility that the fractured femur could have been caused by the

bus accident. (Before you can find the representations to be false, the evidence of the falsity must be clear, convincing and satisfactory.)

Rice vs. Tissow, 57 Ariz. 230; 112 Pac. (2d) 866.

Modified. [57]

INSTRUCTION No. 6

You are instructed that although you may find that plaintiff, Zoa Zane's, hip was fractured in the bus accident, and it was falsely represented to her that there was no fracture of the hip, yet the falsity of such representation, if any, will not entitle the plaintiffs to recover unless they go further and prove to your satisfaction by clear and convincing evidence that the falsity of such representation was known to the person making the same at the time he made it, and that he knowingly made a false representation for the purpose of inducing the plaintiffs to execute the release in question, and that plaintiffs relied upon the same.

Waddell vs. White (Ariz.) 108 Pac. (2d) 565.

Refused. [58]

INSTRUCTION No. 7

You are instructed that the plaintiffs claim and assert in their complaint that in making a settlement and signing the release in question they relied upon certain statements made to them by one, Dr. Blackman, whom they allege to be an agent of

the defendant company. Defendant in its answer denies that said Dr. Blackman was or is an agent of the defendant.

Therefore, before you can give any consideration whatever to the alleged representations on the part of Dr. Blackman the plaintiffs must first prove to your satisfaction by a preponderance of the evidence that said Dr. Blackman was at the time that he made such representations, an agent of the defendant company, authorized to make the representations.

U. S. Smelting, Refining and Mining Exploration Company vs. Wallapai Mining Development Company, 27 Ariz. 126, 230 Pac. 1109.

Given. [59]

INSTRUCTION No. 8

You are instructed that while agency does not need to be proved by direct testimony, and may be established from circumstances such as relationship of parties to each other and to the subject matter and their acts and conduct, but the acts and conduct of the principal alone and not of the agent must be relied upon to show agency. Agency cannot be proved by declarations of the agent above or of a third person, other than the principal.

Therefore in this case in determining whether or not Dr. Blackman was an agent of the defendant company, you cannot take into consideration the acts and declarations of Dr. Blackman himself alone or of third persons. You must be governed solely

by the acts, conduct and declarations of the defendant company or of its proven, authorized agents. If the only proof of agency are the acts and declarations of Dr. Blackman himself, then you must find that no agency existed.

Bristol vs. Moser, 55 Ariz. 185, 99 Pac. (2d) 706.

Modified. [60]

INSTRUCTION No. 9

You are instructed that although you may find from a preponderance of the evidence that the relation of principal and agent did exist to some extent between the defendant company and Dr. Blackman, and statements were made by such doctor to plaintiffs, or one of them, but that said Dr. Blackman was without authority to represent the defendant in the negotiation of a settlement with and a release from the plaintiffs on account of injuries incurred, and such statements were not made for the purpose of influencing the plaintiffs in making a settlement, a release subsequently negotiated by an agent of the defendant company without knowledge on his part of the statements made by the doctor cannot be avoided by reason of such statements.

45 Am. Jur., p. 688.

Refused. [61]

INSTRUCTION No. 10

You are instructed that although the defendant company may use and have used Dr. Blackman to

treat its own employees for illness and accidents not occurring in the course of employment, under a hospital and medical benefit plan established by the company and for which deductions are made from the payroll of the employees; that does not necessarily constitute Dr. Blackman an agent of the company insofar as injured passengers and third persons are concerned. That agency, if any, would be restricted to employees entitled to the medical and hospital benefits provided by the company.

Modified. [62]

INSTRUCTION No. 11

You are instructed that there is no legal duty upon a carrier of passengers to furnish medical and hospital services to a passenger injured in an accident other than first aid. If liability on the part of the carrier for the accident and injuries to the passengers is established, then the carrier becomes liable in damages to the passenger, which includes medical and hospital expenses incurred by him; but that does not place the duty upon the carrier to furnish a physician, medical and hospital assistance to the passenger except such as are necessary for first aid in the first instance.

The only duty that develops upon the carrier on the injury of a passenger is the duty invoked by the humanitarian doctrine—that is, the duty to use every effort to get the injured passenger to a physician or a hospital for treatment. That fact that a carrier complies with such humanitarian doctrine and takes the injured passenger to a physician for

treatment does not in itself constitute such physician an agent of the carrier.

Modified. [63]

INSTRUCTION No. 12

You are instructed that the fact that the defendant company as a part of the settlement with the plaintiffs for their claim for injuries to the plaintiff, Zoa Zane, paid the doctor's and hospital bills incurred by Zoa Zane, does not alone constitute the doctor and hospital, or either of them, an agent of the defendant.

Modified. [64]

INSTRUCTION No. 13

Even though you should find from the evidence that there were false representations made to the plaintiffs, and that they were induced thereby to accept the money and execute the release, yet if you should further find from the evidence that they failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, and continued to retain and use the consideration paid them for the release for an unreasonable length of time after discovery of the fraud, then the plaintiffs are deemed to have ratified the release, and they cannot now set aside the release, and under such a state of facts your verdict must be for the defendant.

Colorado Springs, etc. Hy. Co. vs. Huntling (Colo.), 181 Pac. 129, 45 Am. Jur. p. 690.

Refused. [65]

INSTRUCTION No. 14

You are instructed that if you should find from a preponderance of the evidence that the plaintiffs in this case are entitled to recover, and the release should be set aside and voided, but that the plaintiffs are unable to make restitution to the defendant of the amount or amounts received by them on account of said release, then the defendant is entitled to receive full credit for the amount paid by it to the plaintiffs for said release. In other words, if you should find for the plaintiffs, in arriving at your verdict for damages, if any, to which they are entitled you must first deduct all amounts received by them from the defendant on account of the release in question.

45 Am. Jur. p. 716.

Refused.

[Endorsed]: Filed May 22, 1945. [66]

[Title of Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs and assess their damage at \$10,000.00.

E. P. KETCHIE,
Foreman.

[Endorsed]: Verdict filed May 22, 1945. [67]

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Monday, May 28, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

It Is Ordered that the form of Judgment presented herein by counsel for the plaintiffs and approved as to form by counsel for defendant, pursuant to verdict rendered herein, be approved, entered, filed and spread upon the minutes as the judgment herein as follows:

Civ-642

ZOA H. ZANE and JACK ZANE, her husband,
Plaintiffs,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

JUDGMENT

On the 17th day of May, 1945, the above entitled action came on for trial, the cause having been regularly set down for trial by stipulation of respective counsel. The plaintiffs appeared in person and by their attorneys, Terrence A. Carson and Floyd M. Stahl, and the defendant appearing through its attorneys, Baker & Whitney. A jury of twelve men good and true were impaneled and sworn to try said cause. Witnesses on the part of the plaintiffs

and the defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the Jury retired to consider of their verdict, and on May 22, 1945, returned into open Court the following verdict which is in words and figures as follows: to-wit:

ZOA H. ZANE and JACK ZANE, her husband,
Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiffs and assess their damage at \$10,000.00.

E. P. KETCHIE,
Foreman.

(Back)

Verdict—Filed May 22, 1945. Edward W.
Scruggs, Clerk.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is Ordered, Adjudged and Decreed that the plaintiffs, Zoa H. Zane, and Jack Zane, her husband, do have and recover from the defendant, Pacific Greyhound Lines, a corporation, the sum of Ten Thousand (\$10,000.00) Dollars, with six per cent (6%) interest from the 22nd day of

May, 1945, together with plaintiffs' costs taxed and allowed in the sum of \$23.26.

Done in Open Court This day of , 1945.

.....
Judge.

Received copy and approved as to form this 28th day of May, 1945.

BAKER & WHITNEY,
Attorneys for Defendant.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT AND FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT; AND ALTERNATIVE MOTION FOR NEW TRIAL

Now Comes the defendant by its attorneys and pursuant to Rules 50 and 59, Rules of Civil Procedure for the District Courts of the United States, moves the Court for an order setting aside and vacating verdict and judgment rendered and entered in the above captioned and numbered cause in favor of the plaintiffs and directing the rendition and entry of judgment in favor of the defendant in accordance with the motion for directed verdict; and, in the alternative, for an order granting defendant a new trial, for the following reasons and upon the following grounds:

I.

GROUNDS FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

(1) The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant made at the close of all the evidence and the Court should have granted such motion and should have directed the jury to return a verdict in favor of the defendant and the court should now render and enter judgment in favor of the defendant in accordance with motion for directed verdict and notwithstanding the verdict in favor of the plaintiffs. [70]

(2) The evidence is insufficient to sustain a cause of action in favor of the plaintiffs and is insufficient to support the verdict or the judgment rendered in accordance with the verdict, and the verdict and the judgment are not justified by the evidence and are contrary to the evidence and the law.

II.

GROUNDS FOR NEW TRIAL

(1) That there were errors of law appearing at the trial and during the progress of the cause.

(2) That the Court erred in admitting evidence on behalf of the plaintiffs over the objection of defendant.

(3) That the Court erred in charging the Jury.

(4) That the Court erred in that contradictory

and conflicting instructions were given to the jury which misled and confused the jury.

(5) The Court erred in that there were harmful repetitions in many instructions in favor of the plaintiffs' theory of the case.

(6) The Court erred in giving plaintiffs' requested instructions numbered 2, 5, 6 and 10, upon the grounds: That said instructions do not properly state the law applicable to the facts in this case; that said instructions are not in accordance with the evidence introduced in this case; that in said instructions rules of law are stated which are not applicable to the facts of this case and in giving said requested instructions the court unduly, by repetition, accentuated plaintiffs' theory of the case; that there is conflict and contradiction in said instructions misleading to the jury.

(7) The Court erred in refusing defendant's requested instructions numbered 1, 2, 6, 9, 13 and 14, upon the grounds that said instructions, and each of them, properly state the [71] law applicable to the facts of this case and the defendant was entitled to have each and every one of said instructions given to the jury and the refusal of the same, and each of them, resulted in the case being submitted to the jury without proper instructions on defendant's theory of the case, and the refusal of said instructions, and each of them, greatly prejudiced the defendant.

(8) The Court erred in admitting, over the objection of the defendant, evidence offered by

plaintiffs of conversations with, and acts and declarations by, persons not proved to be agents or representatives of the defendant, or authorized to act for or in behalf of defendant.

(9) The Court erred in admitting, over the objections of the defendant, opinion testimony of experts based upon hypothetical questions not proper in form and not properly stating all of the evidence introduced in the case pertinent to the matter in question and improperly stating facts which were not in evidence in the case.

(10) That the damages awarded plaintiffs are excessive and appear to have been given under the influence of passion or prejudice.

(11) That the verdict of the jury was influenced by passion or prejudice.

(12) The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant at the close of the plaintiffs' evidence.

(13) That the Court erred in denying defendant's Motion for an instructed verdict at the close of all the evidence.

(14) That the evidence is insufficient to sustain a cause of action in favor of the plaintiffs and is insufficient [72] to support the verdict or judgment and the verdict and judgment are not justified by the evidence and are contrary to the evidence and to the law.

Wherefore, defendant prays that the verdict of the jury herein and the judgment rendered and entered thereon be set aside and vacated and a judgment be rendered and entered herein in favor of the defendant in accordance with Motion for Directed Verdict notwithstanding the Verdict, in favor of the plaintiffs; and in the alternative, that the Court set aside said verdict and judgment in favor of the plaintiffs and grant the defendant a new trial herein.

Dated at Phoenix, Arizona, this first day of June, 1945.

BAKER & WHITNEY.

By ALEXANDER B. BAKER,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 1, 1945. [73]

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Monday, June 4, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

Pursuant to stipulation of counsel herein,

It Is Ordered that plaintiffs be allowed to and including June 9, 1945, to file reply to defendant's memorandum on Motion for Judgment, notwithstanding the verdict.

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Friday, June 8, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

Pursuant to stipulation of counsel filed herein,

It Is Ordered that the defendant's Motion for Judgment for defendant, notwithstanding the Verdict, and for Judgment in accordance with Motion for Directed Verdict, and alternative motion for new trial, be continued for hearing from June 11, 1945, to June 18, 1945, and

It Is Ordered that plaintiffs may have to and including June 12, 1945, to serve and file their brief or memorandum of points and authorities in opposition to said motions.

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Monday, June 18, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

Defendant's Motion for Judgment for defendant notwithstanding the verdict and for judgment in

accordance with Motion for Directed Verdict and Alternative Motion for New Trial come on regularly for hearing this day. [93]

Alex Baker, Esquire, is present on behalf of the defendant and Terrence Carson, Esquire, and Floyd M. Stahl, Esquire, are present for the plaintiffs.

The defendant's motions are now duly argued, and

It Is Ordered that said motions be and they are submitted without any further argument and by the Court taken under advisement.

It Is Further Ordered that the defendant be and it is allowed five days within which to file a Supplemental Memorandum herein and the plaintiffs be and they are allowed five days thereafter to reply thereto.

[Title of Court and Cause.]

April, 1945, Term at Phoenix

Minute Entry of Wednesday, July 25, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

It Is Ordered that defendant's Motion for Judgment for defendant notwithstanding the verdict and for judgment in accordance with Motion for Directed Verdict and Alternative Motion for New Trial be and they are denied.

[Title of Court and Cause.]

October, 1945, Term at Phoenix

Minute Entry of Thursday, October 18, 1945

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

Alex Baker, Esquire, is present on behalf of the defendant. No appearance is made by or on behalf of the plaintiffs.

Counsel for the defendant now presents the defendant's Supersedeas and Cost Bond on Appeal in the sum of \$15,000.00 with the Saint Paul Mercury Indemnity Company as surety thereon, and

It Is Ordered that said bond be and it is hereby approved. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Pacific Greyhound Lines, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about the 28th day of May, 1945, and from the order denying defendant's "Motion for Judgment for Defendant Notwithstanding The Verdict and for Judgment In Accordance With Motion for Directed Verdict; and Alternative Motion for New Trial" entered in this action on or

about the 25th day of July, 1945, and from the whole and all of said judgment and order.

Dated at Phoenix, Arizona, this 18th day of October, 1945.

BAKER & WHITNEY,
Attorneys for Pacific Grey-
hound Lines, Defendant.

[Endorsed]: Filed Oct. 18, 1945. [95]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men By These Presents:

That we, Pacific Greyhound Lines, a corporation, defendant above named, as principal, and Saint Paul-Mercury Indemnity Company, of Saint Paul, Minnesota, as surety, are held and firmly bound unto Zoa H. Zane and Jack Zane, her husband, plaintiffs above named, in the full and just sum of Fifteen Thousand (\$15,000) Dollars, to be paid to the said Zoa H. Zane and Jack Zane, their certain attorneys, heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of October, 1945.

Whereas, lately in the District Court of the United States for the District of Arizona, in a suit

depending in said court, between Zoa H. Zane and Jack Zane, her husband, as plaintiffs, and Pacific Greyhound Lines, a corporation, as defendant, a judgment was rendered and entered in favor of said plaintiffs and against the said defendant, Pacific Greyhound Lines, and thereafter said court did render and enter an order denying said defendant's "Motion for Judgment for Defendant [96] Notwithstanding the Verdict and for Judgment In Accordance With Motion for Directed Verdict; and Alternative Motion for New Trial;" and the said defendant, Pacific Greyhound Lines, having filed in said Court a notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and order.

Now, the condition of the above obligation is such that if the said Pacific Greyhound Lines, defendant above named, shall prosecute its said appeal to effect and satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages the appellate court may award if the judgment be modified, then the above obligation

to be void; otherwise to remain in full force and effect.

PACIFIC GREYHOUND LINES.

[Seal] By EARL F. PARKS,

Superintendent, Principal.

SAINT PAUL-MERCURY IN-
DEMNITY COMPANY, of Saint
Paul, Minnesota.

[Seal] By GEORGE H. MYERS,

Attorney-in-Fact, Surety.

The foregoing bond and surety approved, and when filed it shall operate as a supersedeas.

DAVE W. LING,

United States District Judge.

[Endorsed]: Filed Oct. 18, 1945. [97]

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND PROCEEDINGS TO BE CONTAINED IN RECORD ON APPEAL

To: Edward W. Scruggs, Clerk of above court, and Mr. Terrence A. Carson, and Messrs. Stahl & Murphy, Attorneys for Plaintiffs:

Now Comes Pacific Greyhound Lines, a corporation, by its attorney, defendant above named and appellant, and designates the following records and proceedings in the above cause to be contained in the record on appeal:

All pleadings, evidence, depositions, testimony, exhibits, minutes, documents, papers, records and proceedings in this action, including this designation and all orders, papers and proceedings hereafter entered, filed or had in this action in this court.

There is filed herewith two copies of the Reporter's Transcript of the Evidence.

Dated: October 18, 1945.

BAKER & WHITNEY.

By ALEXANDER B. BAKER,
Attorneys for Defendant.

Receipt of Copy acknowledged October 18, 1945.

TERRENCE A. CARSON,
STAHL & MURPHY.

By TERRENCE A. CARSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 18, 1945. [98]

[Title of District Court and Cause.]

STIPULATION FOR DIMUNITION OF RECORD

It Is Hereby Stipulated and Agreed by and between attorneys for plaintiffs and defendant above named that it shall not be necessary for the Clerk of the above entitled court to transmit to the Clerk of the United States Circuit Court of Appeals for the 9th Circuit as a part of the record on appeal

the following named papers, documents and exhibits, to-wit:

1. Praeclipe for Summons.
2. Summons.
3. Stipulation extending time for deft. to plead and answer.
4. Stipulation extending time for deft. to plead and answer.
5. Plaintiffs' Motion and Notice of Setting Cause for Trial.
6. Plaintiffs' Demand for Jury.
7. Plaintiffs' Praeclipe for Subpoena to Homer F. West.
8. Plaintiffs' Praeclipe for Subpoena to Homer F. West.
9. Depositions of Zoa H. Zane and Jack Zane.
10. Subpoena for Homer F. West with Marshal's honest return.
11. Plaintiffs' Memorandum of Cost and Disbursements.
12. Defendant's Objection to Plaintiffs' Statement of Costs.
13. Stipulation for Plaintiffs to File Memorandum.
14. Stipulation to continue hearing on Motions to June 18, 1945.
15. Receipt of Reporter for file and exhibits.

16. Receipt of Reporter for Depositions and requested instructions.

17. Plaintiffs' exhibits Nos. 3, 4, 8, 9, 10 and 11 in evidence which are x-ray photographs.

18. Defendant's exhibits F to J in evidence, inclusive, which are x-ray photographs.

19. Defendant's Exhibit A-F in evidence which is depositions of Dr. W. H. Blackman and Mrs. Gladys Payne, both of which are transcribed verbatim and full in the reporter's transcript of evidence. [99]

20. Defendant's Exhibit A-G in evidence, being the deposition of Alpha Marcum which is transcribed verbatim and in full in the reporter's transcript of evidence.

Dated this 25th day of October, 1945.

TERRENCE A. CARSON,
STAHL & MURPHY.

By FLOYD M. STAHL,
Attorneys for Plaintiffs.

BAKER & WHITNEY,
By ALEXANDER D. BAKER,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 5, 1945. [100]

[Title of District Court and Cause.]

ORDER TO SEND UP ORIGINAL EXHIBITS

On motion of attorneys for Defendant:

It Is Ordered that in addition to the transcript of the record on appeal in this action the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the following original exhibits in this action to be by him safely kept and returned to this court upon the final determination of this action in said Circuit Court of Appeals, namely:

All of plaintiffs' and defendant's exhibits in evidence, save and except those expressly excluded from the record on appeal by "Stipulation for Diminution of Record" signed by attorneys for plaintiffs and defendant and on file herein.

Dated November 6, 1945.

DAVE W. LING,

U. S. District Judge.

[Endorsed]: Filed Nov. 7, 1945. [101]

CERTIFICATE TO TRANSCRIPT OF
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of Zoa H. Zane and Jack Zane, her husband, Plaintiffs, vs. Pacific Greyhound Lines, a corporation, Defendant, numbered Civ-642 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 101, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation of Record and Proceedings to be Contained in Record on Appeal and Stipulation for Dimunition of Record, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$18.95 and that said sum has been paid by counsel for the appellant.

I further certify that plaintiffs' original exhibits numbered 1, 2, 5, 6, 7, and 12, defendant's original exhibits numbered A, B, C, D, E, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AB, AC, AD, AE, AH, AI, AJ, and AK, and the original Reporter's Transcript, in two volumes, filed in said cause, are transmitted herewith and made a part of this record.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 23rd day of November, 1945.

[Seal] EDWARD W. SCRUGGS,
 Clerk.

By WM. H. LOVELESS,
Chief Deputy Clerk. [102]

In the United States District Court for the
District of Arizona

Civil 642

ZOA H. ZANE, and JACK ZANE, her husband,
Plaintiffs,
vs.PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly to be heard in the above-entitled Court, before Honorable Dave W. Ling, Judge, presiding with a jury, commencing at the hour of 10 o'clock A. M. on the 17th day of May, 1945.

The plaintiffs were represented by their attorneys, Floyd Stahl of Messrs. Stahl and Murphy, and Terrence A. Carson.

The defendant was represented by Alexander B. Baker of Messrs. Baker and Whitney.

Thereupon the following proceedings were had:

The Clerk: Civil 642, Zoa H. Zane and Jack Zane, Plaintiffs, versus Pacific Greyhound Lines.

The Court: Ready?

Mr. Carson: Yes, we are ready. [1*]

Mr. Baker: The defendant is ready.

Mr. Carson: Your Honor, with this exception: we have got to call two or three doctors, and it might be—we might have to put them on out of

*Page numbering appearing at top of page of original Reporter's Transcript.

turn, or something like that. Would there be any objection to that, Mr. Baker, because the doctors are very busy. I have talked to them.

Mr. Baker: I have enough trouble with them myself so I will be quite lenient.

Mr. Carson: All right.

The Court: Call the names of eighteen jurors. As your names are called, come forward.

Thereupon a jury was duly empanelled and sworn to try the cause; the pleadings of the parties were read to the jury and statements of the issue were made by the respective counsel as follows:

Mr. Carson: Your Honor, Mr. Baker, and gentlemen of the jury. Gentlemen of the jury, we will show that in December, I think it was 1942, about the tenth of the month, Mrs. Zane left with a youngster of hers and went to work in—was going to a war plant in California to work. She had had some conversation and correspondence with the war plant about going to work over in California. She purchased a ticket and got on the bus and went over there, and on the morning, I [2] think of the eleventh of December, 1942, a short ways out of Indio, California, there was a wreck. We will show that the driver of the bus ran into a truck over there and that she suffered a very severe injury. Her leg was so mangled that it had to be amputated below the knee. We will show, gentlemen of the jury, that she was taken to the Coachella Valley Hospital in Indio, and there was a surgeon named Dr. Blackman who amputated her leg, and shortly

after she arrived in the hospital she was given an anesthetic and she was told by the nurse that the Greyhound would take care of the bill and that she needn't worry about it.

Mr. Baker: If the Court please, that evidence would be incompetent and therefore it is not proper to put in that statement.

Mr. Carson: Well, Your Honor, we will show it is competent and it is their part of the case. Now, I don't want to make any statement that is not the law and I will assure the Court that I'm not going to. We have gone into the question very thoroughly.

The Court: All right.

Mr. Carson: That she stayed in the hospital over there for some months. I think the injury was on a Friday, and in a very short time the [3] claim agent for the Greyhound came to see her at the hospital, and on the first visit he gave her his card and on the second visit, or shortly thereafter, he told her that Dr. Blackman was a good doctor and he was their doctor and that she would be well taken care of.

After staying in the hospital for some time—she received treatment and her knee was—there was some trouble about her knee and they performed an operation on her knee—below the knee, another operation.

We will show that as long as—that the claim agent there came on an average sometimes of once or twice a week. We will show that he finally made a proposition of settlement. We will show, gen-

lemen of the jury, that I think about a week after the accident, the husband went to California. He was down in Yuma and they sent him a telegram but it never reached him until a week after. That was about five days, and as soon as he found out about his wife being in a delicate condition, why, he went over there and the claim agent talked with him, I think, on the Sunday after he arrived. There was some suggestion by the husband to take his wife clear over to a Los Angeles hospital. The claim agent said that Dr. Blackman was a good [4] surgeon and was a good bone doctor and was just as good as any other doctor and took care of the Greyhound cases, and he was their doctor and he would take care of the bill, and in the course of the while she was in the hospital there, we will show you beyond any question of doubt that she was in pain and she took sedatives or narcotics nearly all the time, and the claim agent, on his visits, suggested settlements and they talked over settlements, and finally, along, I think sometime in February, I don't know the exact date of that, but we will show that they talked settlement.

Now, the basis of the settlement was \$14,500.00.

Now, we will show that the Greyhound paid the doctor's bill, but we will also show, gentlemen of the jury,—and now we come to the crucial part of this case—that she had a fractured hip, that she suffered pain in the knee and on the right side, and she asked Dr. Blackman about it and asked the claim agent about it, and the claim agent assured her that everything was all right, that there was

nothing wrong with her at all, that she would be able to be a normal person.

Now, Dr. Blackman 'phoned a supply man in Los Angeles; that is, a manufacturer of artificial limbs, and he came up there, and Mrs. Zane was [5] shown pictures of persons using artificial limbs, that she could stand and do everything that a normal person could, and we will show, gentlemen, that Dr. Blackman represented to her that she could do that, and the claim agent represented to her and made the positive assurance that there was nothing wrong with her at all.

We will show that this right hip was not X-rayed. X-ray pictures were taken apparently of the knee but not the right hip.

We will show that some days before the settlement Mr. Cameron brought a release to her room filled out with the amount of \$14,500.00, and that it described injuries in detail, where it took place and described the injury, amputated below the knee, that that was left with her for some few days, and there was one release and it was left with her.

We will show that on the day of the settlement Mrs. Zane was rather hysterical; she was crying around, and the claim agent came to the place, stormed around and said he was going to lose his job if the case was not settled, or something like that, and finally the husband and the wife signed the release.

We will show that after this artificial [6] limb agent—the man that made the artificial limbs from

Los Angeles said to Mrs. Zane that one of her legs was $2\frac{1}{2}$ inches shorter than the other; there was something wrong, probably better X-ray her hip. She talked to Dr. Blackman and Dr. Blackman never answered her, but assured her that nothing was wrong with her, that she needed X-rays, and he assured her that she was reading too many magazines.

We will also show that she was fitted with a limb, and shortly after she came to Phoenix, why, she went to a limb company here and tried to get—she couldn't use her artificial limb. She was led to believe she could walk out of the hospital, and later this man here found out, the man that makes the artificial limbs, I have forgotten his name, the shop here, he measured her and found it was two inches short. X-rays were taken and showed that her hip was broken, which Dr. Lytton-Smith, her surgeon, performed an operation and healed the situation.

We will show she has been permanently and totally disabled.

Now, gentlemen of the jury, we will admit that if the settlement had been as represented, or there had not been deceit and fraud practiced, [7] the settlement would have been very satisfactory.

We will show that due to the fraudulent representations of the defendant, its agent, this woman here has been made a hopeless cripple all her life, that she can't be a wife, she can't have children, she can't be a normal wife; she has to go around with crutches under her arms; that she can't take

care of her children and she continually suffers pain, and we are asking, gentlemen, for damages in the sum of \$50,000.00.

Now, we expect to prove each one of these allegations, and when we do that, gentlemen, we will ask for a verdict at your hands.

I thank you.

Mr. Baker: I will reserve my statement until the finish of the case.

The Court: Call your first witness.

Mr. Stahl: Mrs. Zane.

ZOA H. ZANE

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Stahl:

Q. State your name.

A. Mrs. Zoa Zane. [8]

Q. Mrs. Zane, you are one of the plaintiffs in this case? A. Yes, sir.

Q. Where do you reside?

A. 1722 W. Tonto, Phoenix.

Q. How long have you resided in Phoenix?

A. For about nine years.

Q. You are the wife of Jack Zane?

A. Yes, sir.

Q. When were you and Jack Zane married?

A. In June of 1938.

(Testimony of Zoa H. Zane.)

Q. And do you have any children?

A. We have two boys, aged five and three.

Q. Now, were you living in Phoenix, you and your husband, residents of Phoenix in the month —during the month of December, 1942?

A. Yes, sir.

Q. And did you live in the same place as you live now? A. No.

Q. Another address in Phoenix? A. Yes.

Q. And you have been residents of Arizona right along? A. Yes, sir.

Q. Were you married here? [9] A. Yes.

Q. Now, in the month of December, 1942, did you plan a trip to California? A. Yes, sir.

Q. And what was the purpose of that?

A. I was going to work in the Douglas Aircraft in Long Beach.

Q. In Long Beach? A. Yes, sir.

Q. And what were you going to do over there?

A. Oh, I was to be an assemblyer.

Q. Had you made arrangements with them as to what position you were to get?

A. Well, I had been over there the week before.

Q. What were those arrangements?

A. I was to start at fifty cents an hour, I believe. I believe it was five cents raise on the hour every month or six weeks.

Q. Prior to that time had you done any work for compensation, or had you—

A. (Interrupting): Well, not very large. I did a little laundry work and a little waitress work.

(Testimony of Zoa H. Zane.)

Q. Aside from that since you have been married, you just attended to your household duties and your children? [10] A. Yes, sir.

Q. Now, when did you finally leave for California?

A. On the evening of the tenth of December.

Q. Prior to that time had you purchased your ticket? A. Yes.

Q. At the Greyhound Bus Station?

A. Yes, sir.

Q. And you left Phoenix on the evening of the tenth about what time?

A. I think it was about 9:00 o'clock in the evening.

Q. On the Greyhound bus? A. Yes.

Q. And then you traveled all that night, did you? A. Yes, sir.

Q. And on the morning of the eleventh will you tell us what happened?

A. Well, it was, after we had left Indio on Highway 99 going towards Los Angeles, the bus pulled up behind a truck and the truck was meeting a car coming from the opposite direction and then I thought the bus was crawling up too close behind the truck, I was kind of braced, and just as the [11] car coming from the other direction passed the truck, the bus pulled out to go around the truck in front of it and it caught the front right-hand side of the bus, on the rear of the truck.

Q. As it ran into the truck and hit it from the

(Testimony of Zoa H. Zane.)

rear—hit the rear of the truck—it ran into the truck? A. Yes.

Q. Was the truck in front of the bus moving?

A. Yes.

Q. And was it moving slowly or rapidly?

A. Well, I think it was moving about an even rate of speed. It was not going fast.

Q. All right. When the bus collided with the rear of the truck, what happened then?

A. Well, I was thrown to the floor—

Q. (Interrupting): Wait a minute, where were you in the bus?

A. I was in the front seat, right front side of the aisle.

Q. Then what happened when the collision occurred?

A. I was—I had a hand-hold on the bar that goes from the floor to the ceiling, and I was either thrown through the windshield or the door, I don't know which, but when I got up on my foot [12] again I was on the pavement.

Q. What, if anything, happened to the front of the bus?

A. Well, I guess it was torn away. The front of it and a part of the windshield.

Q. You say you were thrown out of the bus?

A. Yes, I guess I was. My feet was on the ground when I got up on my feet.

Q. Did you have the child in your arms?

A. Yes.

Q. By the way, you took your child with you?

(Testimony of Zoa H. Zane.)

A. Yes.

Q. Which one was that, one of the young ones?

A. It was the baby, nine months old.

Q. The other child you left here?

A. No, he was already with my sister in California.

Q. You intended to leave this child with your sister, too? A. Yes.

Q. You had the child in your arms at the time this accident happened?

A. Well, it seemed to me I was trying to put him behind me.

Q. Well, now, when you were thrown out of the bus did you still have the child? [13]

A. He was lying in the floor by the seat and I picked him up and was holding him. I was balanced on my left hip. My right leg was numb.

Q. You say your right leg was numb. Did you try to bear any weight on it?

A. Yes, I tried to put it on the ground but there was no feeling in it.

Q. All right. What happened then?

A. Well, a lady got off the bus and picked the baby up for me and I stood there for a while and I believe it was a soldier who came by and I asked him if he would help me sit down and he noticed my foot was pretty badly torn up and they got me laying down and they put a tourniquet around my leg.

Q. On the pavement there?

A. Well, along the side of the road.

(Testimony of Zoa H. Zane.)

Q. And how long did you remain there?

A. Oh, not very long, just possibly thirty minutes.

Q. And then what was done after that?

A. Well, the ambulance from Indio came out and I was taken, I and the baby and the lady that had taken him.

Q. You say the ambulance from Indio came out?

A. Yes, sir. [14]

Q. You were put in the ambulance?

A. Yes.

Q. And where were you taken?

A. I was taken to the Coachella Valley Hospital in Indio.

Q. Coachella Valley Hospital? A. Yes.

Q. In Indio? A. Yes.

Q. Who went with you in the bus?

A. Well, the baby was with me and the lady that had taken him.

Q. Just the three of you? A. Yes.

Q. And when you arrived at the Coachella Valley Hospital—by the way, when you left there did you know where you were going?

A. No, I didn't.

Q. And you did arrive at the Coachella Valley Hospital? A. Yes.

Q. And then what was done after you arrived at the hospital?

A. I was taken in on a stretcher to the emergency operating room and signed the entrance sheet for myself and the baby. [15]

(Testimony of Zoa H. Zane.)

Q. You were taken to the emergency operating room? A. Yes.

Q. And then do you know what was done after that?

A. They started giving me hypos.

Q. Who gave you those?

A. The nurse on duty and then just a few moments at a time I was rational then for several hours.

Q. Well then, when did you first see a doctor?

A. Well, I came out from under the anesthetic for a while and the doctor I later learned was Dr. Blackman was telling me he had to amputate my leg, and I said something, "Let's get it over with," or something like that, and then there was some talk of a spinal anesthetic and in a little while I came to and they were sawing my leg off, and I asked them something about the spinal and they told me I was in too great a shock for a general anesthetic.

Q. Then after that where were you taken, after the operation?

A. I was wheeled into a private room by the two nurses.

Q. At the hospital there? [16] A. Yes.

Q. And were you under the influence of any anesthetic then?

A. Well, I had locals and they were partly worn off. I was rational then. They took me into the room. I saw it was empty and I made some comment about a private room and the nurse said, "You

(Testimony of Zoa H. Zane.)

have nothing to worry about it as the Greyhound will pay for this."

Mr. Baker: We move to strike that part of the answer on the ground it is purely hearsay and irrelevant.

Mr. Carson: Your Honor, on that question we insist that it is very material. We insist that it is a part of the case and that under the decisions it is admissible, very much so.

The Court: Well, how could a nurse bind the Greyhound?

Mr. Carson: Well, Your Honor, on the order of proof that is very true, but here, I feel we will make the connection. I understand you have got to show agency in some way and you can only show it sometimes by circumstantial evidence, and we will avow that we will hook this up. Where there is a chain of circumstances, but this would be, I think—— [17]

The Court (Interrupting): Well, all right, go ahead then.

Mr. Baker: The only thing I'd like to say, if the Court please, I think that is an unjustified avowal. I know something about the case and we have never been able to hook up the nurse in this case. I have taken her deposition.

Mr. Carson: Well, that will be a question, I think, for the jury to determine.

The Court: Well, if it is not proper I will ask the jury to disregard it.

(Testimony of Zoa H. Zane.)

Mr. Stahl: Now, after that, when did you first see Dr. Blackman again?

A. Well, I don't know. It might have been the same day he was in. There was—I asked him about—

Q. (Interrupting): You say it might have been the same day? You think it was either the same day or the next day?

A. Yes, time didn't mean very much when you are pretty well doped up.

Q. And when you saw Dr. Blackman did you have a conversation with him?

A. Yes. I told him what the nurse told me and asked him if that was right and he said, "Yes, all you have to worry about is to get well." He [18] said, "You don't need to worry about the bills, that they will be taken care of."

Mr. Baker: We move to strike that evidence on the grounds previously assigned.

Mr. Stahl: Did he say he would take care of the bills?

Mr. Baker: Just a minute. Can I make an objection, Mr. Stahl?

Mr. Stahl: Yes.

Mr. Baker: We move to strike that answer, if the Court please, upon the grounds previously assigned, no showing of any agency between Dr. Blackman and Greyhound Lines.

Mr. Stahl: Well, I think she can testify, if the Court please, to the arrangements that were made for the payment of the bills in his own hospital. I

(Testimony of Zoa H. Zane.)

mean, she can testify. She was taken to this hospital without knowing anything about where she was being taken, anything of the kind—what was done there or not at her direction or anything of the kind. It is the chain of circumstances is all we possibly can prove.

The Court: Well, it may stand subject to the objections.

Mr. Stahl: You say that—state what was said.

Mr. Baker: She has already said it. I move [19] to strike it and the Court has allowed it to stand for the present.

Mr. Stahl: I don't know what she said. She said something or something of that kind. What was it she said?

A. I asked him about what the nurse had told me and he said, "Yes, that was right, and I didn't have anything to worry about, that the bills would be taken care of."

Q. Did he say by whom or anything of that kind?

A. Well, yes. He said the Greyhound would take care of it and he confirmed what the nurse had told me.

Q. Now, after that did you—how often did the doctor see you?

A. Oh, I'd say he was in every day for quite a while.

Q. And when, if at all, did you first meet a man by the name of Cameron?

A. Well, I think it was about three or four days

(Testimony of Zoa H. Zane.)

after I entered the hospital he first came into my room and the nurse introduced him to me as the Greyhound's claim agent, and he gave me a card to that effect.

Q. Gave you a card as the claim agent for the Greyhound? [20] A. Yes.

Q. And after that you saw him quite frequently?

A. Yes.

Q. Now, the first time he came in, was that after the amputation of your leg?

A. Well, I think the amputation was on a Friday and I think he came into Indio the next Tuesday.

Q. That would be about four days?

A. Yes.

Q. Did you have a conversation with Mr. Cameron?

A. Well, not much that day. He just told me—

Mr. Baker (Interrupting): Just a minute. You can answer that yes or no.

Mr. Stahl: What was the conversation you had with him that day or—

Mr. Baker (Interrupting): We object to it, if the Court pleases. No sufficient proof to show that Cameron is any agent for the Greyhound Lines. You can't prove agency out of the mouth of—

Mr. Carson (Interrupting): Mr. Baker, are you assuming that a claim agent walking into a place has no authority at all, and if you assume if that be

(Testimony of Zoa H. Zane.)

the rule you could not establish agency [21] any place in this earth.

Mr. Baker: Don't make a speech about it. All I have to say is what I have just said, that there is no proof of Cameron being the agent.

The Court: Well, they may be able to prove that. Go ahead.

Mr. Stahl: On the pleadings, if the Court please, we have——

The Court: I said you may proceed.

Mr. Stahl: Well, the first time you saw Mr. Cameron will you tell what the conversation was?

A. Well, he asked me if they were treating me all right, how I felt, and told me I didn't have anything to worry about, that he was representing the Greyhound and they were taking care of the bills.

Q. Was that the substance of your conversation on his first visit?

A. Yes, I think about the first time I saw him.

Q. And did you see him after that?

A. Yes, he was down quite frequent.

Q. Can you tell us about when the next time was?

A. Well, it was possibly a week later he came into the room.

Q. And do you recall any conversation you had [22] with him at that time?

Mr. Baker: Just to save time, may it be stipulated that the same objection be made to all this conversation and the same ruling?

Mr. Stahl: Yes. Will you read the question?

(Testimony of Zoa H. Zane.)

(The last question was read by the reporter.)

The Witness: Well, I was asking him about Dr. Blackman and he said that Dr. Blackman was a very good doctor and he had cause to know that Blackman was a very good doctor.

Q. And did he say anything else at that time?

A. Not that I recall.

Q. Did he say anything about as to whose doctor he was?

Mr. Baker: We object to that. That is definitely leading and suggestive, if the Court please.

Mr. Stahl: I guess that is leading. Did he say anything further or was that all at that time?

A. I was not feeling very well and he would just come in for a few moments.

Q. When did you see him again?

A. I saw him at least once a week, I think, all the time I was there.

Q. When was it that Mr. Cameron, if at all, first took up with you the matter of settlement of the case? [23]

A. Well, I think it was sometime in January that he really got in earnest about it. He had been hinting around about it for quite some time, telling me about other settlements. He was wanting me to make up my mind what I wanted.

Q. Well, during that time, those several weeks after the amputation, what treatment, if any, did you receive?

A. Well, just the dressing of my stump was all.

(Testimony of Zoa H. Zane.)

Q. What medicines, were you given any medicines?

A. Yes, I was. I had hypos quite a bit.

Q. How frequently?

A. Well, as soon as one would wear off they would give me another one.

Q. How long did that continue after that?

A. Well, until after the second operation.

Q. I see. You say you had a second operation?

A. Yes.

Q. What did that consist of?

A. Well, they sawed off some more of my leg and fixed a pad so as to enable me to wear an artificial limb.

Q. That operation was also below the knee?

A. Yes.

Q. How long after the first operation was the [24] second one?

A. Oh, I think it was something like six weeks.

Q. How long were you in the hospital altogether?

A. Almost three months.

Q. From the eleventh of December until—

A. (Interrupting): The eighth of March, 1943.

Q. And now, you say, that after Mr. Cameron had seen you several times he had discussed the matter of settlement? A. Yes.

Q. Did he refer to a settlement? How did he take that up with you, in what way?

A. Well, he would tell me about the other cases he had settled, and like that, and he was—he

(Testimony of Zoa H. Zane.)

wanted me to make up my mind what I wanted, and I told him I would rather wait and see how I got along, and he assured me again that anything that Dr. Blackman told me I could rely on; he was a very good doctor and that he had handled cases for them and he knew he was a good doctor and he was their doctor, and said that any time that Dr. Blackman said I could settle and that I was all right, why, I could take his word for it.

Q. Now, did he, in talking to you, did he tell you about settlements he had made with other [25] people; how much he had paid? A. Yes.

Q. And did he want you to say what you would take for your injuries?

A. Yes, he did.

Q. And did you finally tell him?

A. Well, at first I told him I wanted \$50,000.00.

Q. What did he say about that?

A. He laughed and said, 'If I were Fred Astaire or Ginger Rogers, maybe I could expect a settlement like that,' but, he said, an injury like that was more or less temporary, that within a few months I would be able to wear an artificial limb and be up and doing the same things I did before.

Q. Tell us what happened after that.

A. Well, he said that the Head Office would not accept any such demand as that, and I asked him about \$25,000.00 then. He said he didn't know, he would have to see about it, so I told him I would not submit anything right then until we talked it over and it was, I guess, four or five weeks before

(Testimony of Zoa H. Zane.)

we ever came to an understanding about the settlement.

Q. And when you would name a figure he would tell you he would have to submit it? A. Yes.

Q. And then would you hear from him in any other way besides his visits to you?

Mr. Baker: What was that question?

Mr. Stahl: I asked her if she would hear from him in any other way.

Mr. Carson: Mr. Baker, if she heard from the claim agent in any other manner except personal visits.

Mr. Stahl: Did you have any further communication with him—strike that question. Did you have any other communications with Mr. Cameron other than the personal interviews that you had with him when he called on you?

A. Well, we were waiting—

Mr. Baker (Interrupting): Just a minute, you can answer that yes or no. A. Yes.

Mr. Stahl: And what were they?

A. Well, sometimes it was by telephone and once he sent a wire.

Q. And that was in reference to what the company would do, or what? A. Well, yes.

Q. Well now, when was it—did he 'phone directly to you?

A. No, he would 'phone the nurses at the hospital [27] and they would deliver his message.

Q. When he wired you, that was sent to you at the hospital? A. Yes.

(Testimony of Zoa H. Zane.)

Q. Do you recall what that wire was—

Mr. Baker (Interrupting): Just a minute—

Mr. Stahl (Interrupting): By the way, do you have that wire? A. No, I have not.

Q. Do you recall what it was?

A. Well, it was after I told him that I would settle for \$15,000.00.

Q. Excuse me, you finally advised him that you would settle for \$15,000.00?

A. Yes. Then he wired back that they would allow me \$14,500.00, and \$500.00 for the baby's injuries.

Q. Oh, I see. The baby had received some injuries in the accident?

A. Some minor burns.

Q. Then after that when did you see him?

A. Oh, I think he called later and asked the nurse what I had made my mind up about and she told him that I would accept it, and in a day or so, why, he came down and left a release for my husband and I to sign. [28]

Q. With whom did he leave that?

A. With me.

Q. And was your husband there at the time?

A. No, he was in Las Vegas, Nevada.

Q. By the way, when did your husband first—when did you first see him after this accident?

A. I think it was a week after I was admitted to the hospital.

Q. And where did you see him, there at the hospital? A. Yes, he came to the hospital.

(Testimony of Zoa H. Zane.)

Q. And then was he there continuously from that time?

A. Well, he worked part time there and part time in Las Vegas.

Q. That is, he worked part time in Indio and part time—

A. (Interrupting): Yes.

Q. And he came to the hospital frequently, did he? A. Yes.

Q. And at this particular time when Mr. Cameron came down after the wire, you say your husband was not there at the time?

A. No, he was in Las Vegas.

Q. And what Mr. Cameron left with you was a [29] form of release?

A. Yes, it was all ready to be signed and released.

Q. And what were his instructions to you about that?

A. He told me that in case my husband did come in some time when he was not—Mr. Cameron was not in Indio, for us to go for a Notary Public and sign in front of him.

Q. I see, and then did your husband return?

A. Yes.

Q. When he got back did you ever sign that release? A. I think I signed it, yes.

Q. When did your husband come back?

A. Oh, it was, I think he came back to Indio the 19th of February.

(Testimony of Zoa H. Zane.)

Q. Well, did he return before Mr. Cameron came back again?

A. Yes, I think he did, but it was the same day. I don't remember which one got to the hospital first.

Q. Well, was that release signed before Mr. Cameron returned? A. No.

Q. You don't have that release that was left [30] with you at that time, or do you have it?

Mr. Baker: Just a minute, that is leading and suggestive.

Mr. Stahl: Will you state whether or not you have the paper that was left with you by Mr. Cameron?

A. No, he took it with him after we signed it.

Q. Well, now, will you tell us—do you recall in that paper that he left with you what consideration was stated, the amount?

Mr. Baker: Oh, we object to that, if the Court please, not the best evidence. The release speaks for itself.

The Court: He took it with him.

Mr. Baker: How was that?

The Court: The witness says that Cameron took the release with him. You may answer.

Mr. Stahl: Do you recall the amount?

A. Just set forth \$14,500.00 and it described my injuries.

Q. Do you recall what it said as to the injuries?

A. Yes, it said the loss of my right foot and lower leg.

(Testimony of Zoa H. Zane.)

Q. I see. Now, when Mr. Cameron came, he came there on the nineteenth, did he? [31]

A. Yes, I believe so.

Q. And was your husband there at that time or did he come? A. Yes.

Q. And up to that time you had signed nothing, is that correct? A. That is right.

Q. Then after Mr. Cameron came what did he say?

A. Oh, he came into the room to see if my husband had come back, and he went up to the office to figure up the doctor bills and the hospital bills, and when he came back, why, he handed us a release to sign, and I was under the impression it was the same one that I had in the room, he had taken it before.

Q. Well, what was his attitude about the matter when he came back there on the nineteenth?

A. Oh, he was in a hurry to get the deal closed and said he was apt to get in trouble with the Head Office; he had fooled around the case so much; he would have to make settlement; Dr. Blackman said I was to be released from the hospital and there wasn't any reason for me not to sign it.

Q. And then you say he took it and said he was going to the office? [32] A. Yes.

Q. And did he return to your room then?

A. Yes.

Q. And who was there when he returned?

A. Well, he brought the head nurse back with him, Miss Markham, who witnessed the release.

(Testimony of Zoa H. Zane.)

Q. And then what was done; did you sign the paper there then? A. Yes, we signed it.

Q. And your husband signed it also, did he?

A. Yes.

Q. And you thought that you were signing the paper that he left with you before, you signed this paper?

A. Yes. I, of course, thought that was the one we were signing.

The Court: It's 12:00 o'clock. We will suspend until 2:00. Keep in mind the Court's admonition, Mrs. Cameron. Be back in your place at 2:00 o'clock.

Thereupon a recess was taken at 12:00 o'clock noon.

2:00 o'clock P. M., after recess, all parties as noted on the Clerk's Record being present, the trial resumed as follows: [33]

Zoa H. Zane resumed the witness stand and testified further as follows:

Direct Examination (Resumed)

Mr. Stahl:

Q. Mrs. Zane, will you state whether or not when you were taken to the Coachella Valley Hospital you made any arrangements there for your care and treatment?

A. No, sir; I didn't.

Q. And did you at any time after that?

(Testimony of Zoa H. Zane.)

A. No, sir.

Q. Until after the settlement, I say, up to the time of the settlement you made no arrangements.

A. Yes, I made the settlement and arrangements to stay a few weeks longer.

Q. After that you did? A. Yes.

Q. Will you state whether or not you were presented with any bills from the hospital for doctors or hospital? A. No, sir.

Q. Now, Mrs. Zane, do you know whether any other patients were in the hospital at the time you were from those injuries in this accident?

A. There was one gentleman in the same accident I was. He was there for a few days, and then there [34] were others—from other wrecks there in there at a time or two while I was there.

Q. Now, I believe you stated that from some talk with Mr. Cameron—did you ever have any talks with Mr. Cameron and Dr. Blackman regarding an artificial limb?

A. Yes, I did talk to both of them about it.

Q. About when was that?

A. Well, it was probably the last part of January.

Q. And that was prior to the settlement?

A. Yes.

Q. And will you state what was said at that time, what the conversation was?

Mr. Baker: The same objection we have heretofore made on conversations with either Dr. Blackman and Mr. Cameron.

(Testimony of Zoa H. Zane.)

The Court: You may answer.

(The question was read by the reporter.)

The Witness: Well, they were both in the room together at one time.

Mr. Stahl: That was in your room?

A. Yes, sir; and then they were telling of the people they knew that had artificial limbs, and they both told me that as soon as I was up and had my strength back I would be able to wear an [35] artificial limb and be as good as new, and the only injuries I had was the amputation of my right foot, lower leg.

Q. And do you recall that they had anything with them regarding artificial limbs at that time, or was that later?

A. I think the doctor brought back in one when he was alone, had a pamphlet.

Q. When was that?

A. Well, I think it was even—it was before Mr. Cameron and the doctor were in the room together.

Q. What did he have with him then?

A. He had a pamphlet showing a party who had had an artificial limb high jumping, and he was advertising some brace company that made artificial limbs.

Q. Showing these people using artificial limbs?

A. Yes. He said I would be able to do the same as soon as I was up and could wear an artificial limb.

Q. Now, did you—prior to that time did you

(Testimony of Zoa H. Zane.)

have any talks with Dr. Blackman regarding the extent of your injuries?

A. Oh, yes, several times I asked him about [36] my injuries and he always assured me that that was all that was the matter with me, was just the amputation of my right foot and lower leg and a fractured left ankle, which was minor.

Q. Well, now, on those occasions did you suffer any pain?

A. Yes, I did suffer pain in my knee and right leg, but when I asked the doctor about it he said it was probably the reaction from the amputation.

Q. While you were in the hospital there were no X-rays taken of any part of your body?

A. No, just one that I know of and that was the one below the knee on the right and that was when they thought there was an infection setting up.

Q. Where was that?

A. That was in the stump below the knee on my right side.

Q. That was the only X-ray they took, was of that lower leg, is that right? A. Yes, sir.

Q. Now, when Mr. Cameron, after he had left the form of release with you and then came back on the nineteenth of February, what was your talk with him then regarding the amount, or did you have a talk with him regarding the amount? [37]

A. Well, when he came back for the release, why, we made our minds we would sign it, and then he said that was a very good settlement for this loss

(Testimony of Zoa H. Zane.)

and probably I would not have got as much if I had a lawyer and went to court.

Q. Did you ever discuss that with Dr. Blackman? A. The settlement?

Q. Yes.

A. Yes, and he said he thought that was a very good settlement for just the loss of my foot.

Q. Did you ever have an attorney represent you while you were at the hospital? A. No.

Q. Did you ever discuss the matter of an attorney with Mr. Cameron?

A. Yes, but he said that probably we would get a better settlement if we just dealt with him personally.

Q. Will you state what your condition was while you were in the hospital and up to the time of this settlement.

A. Well, I was bed-fast most all the time.

Q. How was that?

A. I say, I was bed-fast, be in the wheel chair maybe a few minutes a day, and I was very [38] weak and nervous. I was having sleeping powders at night.

Q. Up to the time of this settlement until after that time, will you state whether or not you had any knowledge at all as to any injury to your femur or thigh bone?

A. No, I had none. The doctor assured me many times that all that was the matter with me was just the amputation.

(Testimony of Zoa H. Zane.)

Q. And did you ever discuss that with Mr. Cameron?

A. Yes. He said that the doctor had assured him, too, that that was all that was the matter with me, was just the amputation of my foot and leg.

Q. And will you state why you believed that that was the only—your only injury was the lower foot and lower leg—right foot.

Mr. Baker: We object to that, that is calling for a conclusion of the witness, if the Court please.

Mr. Stahl: I think the Answer will show—

The Court (Interrupting): Why she believed it?

Mr. Stahl: Yes, on what ground did she believe it? [39]

The Court: Well, go ahead.

The Witness: Well, the doctor assured me many times that that was all that was the matter with me.

Mr. Stahl: And did you—will you state whether or not you believed the statements of Mr. Cameron and the doctor?

A. Why, yes, I relied on what they told me.

Q. You relied upon them, did you, in making the settlement? A. Yes, sir.

Q. And had you known that there was an injury to your thigh and femur and thigh-bone so that you could not use an artificial limb, would you have made a settlement?

A. No, I don't think I would have.

Q. Well, do you know whether you would or not? A. No, I would not.

Q. During the course of these negotiations about

(Testimony of Zoa H. Zane.)

the settlement, will you state whether or not anything was said regarding doctors' or hospital bills?

Mr. Baker: I think that is repetition, if the Court please. It has been gone over time after time.

The Court: No, not that. She may answer. [40]

The Witness: There was no mention made to me of hospital or doctor bills.

Mr. Stahl: During those negotiations, I mean during the progress of the negotiations.

A. Yes.

Q. When was anything said—I believe you have testified to that. A. Well, not until—

Q. (Interrupting): I mean, before that.

A. Well, I don't believe I understood the question.

Q. Was there anything said about this shortly after you entered the hospital? A. No.

Q. As to who was to pay them?

A. Yes, they told me the Greyhound would pay them.

Q. You recall, Mrs. Zane, of having overheard a conversation between Mr. Cameron and Dr. Blackman regarding the hospital and doctor's charges?

A. Yes, I heard them.

Q. About when was that?

A. Well, I don't know. It was some time after the second operation, I think.

Q. Was it before or after your settlement?

A. Oh, it was after. [41]

Q. How is that? A. It was before.

(Testimony of Zoa H. Zane.)

Q. Before your settlement?

A. Before the settlement.

Q. But you think shortly after your second operation? A. Yes.

Q. And do you know where they were when you heard them talking?

A. No. They were in the hall or in a room down the hall.

Q. And the door of your room, was it closed?

A. It was open.

Q. Will you relate what that conversation was?

Mr. Baker: We object to that, if the Court please. This is a conversation between Dr. Blackman and Mr. Cameron, do I understand it?

Mr. Carson: Well, it is, counsel——

The Court (Interrupting): Let counsel finish.

Mr. Baker: We object on the ground it would not be binding upon this defendant in any manner or form.

The Court: You may answer. Go ahead and state what you heard.

A. It was concerning my bills, the bills I had made there, and Dr. Blackman agreed to accept [42] a thousand dollars for all hospital and doctor bills on my account.

Mr. Stahl: Who said that?

A. What?

Q. Whose talk are you relating, I don't understand.

A. I said, from what I heard, Dr. Blackman

(Testimony of Zoa H. Zane.)

had agreed to accept a thousand dollars for my hospital and doctor bills.

Q. Who said that? A. Mr. Cameron.

Q. I see.

A. And the doctor told him that my condition was—I was so weak for such a long time they had to postpone the second operation for quite a while, that therefore it would run up a bigger hospital and doctor bills than he first thought and he couldn't settle for no thousand dollars, and later Cameron came into the room and told me that Dr. Blackman had agreed to take care of me for a thousand dollars and now he changed his mind about it.

Q. Do you recall anything else that Mr. Cameron said?

A. Well, he made some mention of getting in trouble with the Head Office.

Q. Did Dr. Blackman ever mention the matter [43] of that conversation with you?

A. Well, after Mr. Cameron left, why, he also came into the room and was telling me that Cameron was wanting him to take a thousand dollars, but that he could not on account of he said he didn't know how much the hospital and doctor bills were, anyway, and he was sure they were more than that.

Q. Now, Mrs. Zane, upon this settlement being made, how much did you receive?

A. \$14,500.00.

Q. And then from that time after the settlement was made, would you state who took care of—how long did you remain at the hospital after that?

(Testimony of Zoa H. Zane.)

A. For about three weeks after the settlement.

Q. And who took care of the hospital and doctor bills after the settlement?

A. I did after the settlement.

Q. And do you recall how much that was?

A. It was one hundred and forty some dollars.

I don't remember just how much.

Q. Now, when was it, Mrs. Zane, that you had anything to do with an artificial limb; that is, what was done in that connection?

A. Well, that was even before I signed the release, Dr. Blackman had wrote or telephoned Los Angeles and they sent an agent out and measured me [44] up with an artificial limb, and after the settlement was made, why, in a week or two, why, he brought it out to fit.

Q. Brought the artificial limb down to the hospital at Coachella for a fitting? A. Yes.

Q. Then what?

A. Well, I tried to use it but it was too short. He had to take it back and lengthen it and he said it was—the agent from the brace shop did state he thought there must be something the matter with my hip and asked if I had had it X-rayed. I told him I didn't know, that I didn't think there were any, and he advised me to talk to Dr. Blackman about it.

Q. How long was that after the nineteenth of February, after the settlement was made?

A. I think that was in March. It was just a few days before I left the hospital.

(Testimony of Zoa H. Zane.)

Q. A few days before you left?

A. A few. I don't remember just how many.

Q. And then did he return, take the artificial limb back with him?

A. Yes, he took it back and he told me, he said, "If the doctor has already released you, you just as well go on home and," he said, "we [45] will mail it to you," so, therefore, I was back in Phoenix before I got the limb.

Q. How was that?

A. I say, I was back in Phoenix when I got the limb.

Q. They sent it to you here? A. Yes.

Q. Then what did you do with it after you received it here?

A. Well, I started trying to use it and began wearing it as soon as I got it.

Q. But you mentioned something about the man who brought it down to the hospital in Indio suggested you talk to Dr. Blackman about it.

A. Yes.

Q. Did you do that?

A. Yes, I did, and he told me there wasn't anything the matter with my hip, that I was just lazy and if I would get up and exercise a little I would get to where I could use it.

Q. Did this man that came down take any measurements of your leg?

A. He measured my left leg.

Q. Then do you know the results of that measurement?

(Testimony of Zoa H. Zane.)

A. Oh, he just took the measurements. [46]

Q. He just took the measurement of your left leg?

A. Yes, he took the measurement of my left leg to get the length of the right one for the artificial one.

Q. Oh, I see. Well, do you know what the result of those measurements were?

A. Well, they were about two inches too short, the artificial limb was that they brought out.

Q. Well, then, when you received the limb here in Phoenix, what did you do with it?

A. I began trying to use it.

Q. By yourself, out at your home?

A. Yes, but I could never put any weight on it.

Q. Then what did you do?

A. Well, I thought it was still too short, so I went to this Arizona Brace Shop here in town and they thought it was too short, too, and were going to rebuild it for me.

Q. The Arizona Brace Shop? A. Yes.

Q. And did they do that?

A. Well, they started to—

Mr. Baker (Interrupting): Just a minute, we object to this. Get the Arizona Brace Shop [47] record.

Mr. Carson: Well, Your Honor, except in this way, it shows the condition of the leg and we have got to show it, Your Honor, why she went and had it X-rayed; why she came to find out that the

(Testimony of Zoa H. Zane.)

hip was fractured. I think we have the right to show it.

The Court: Can't you just show that she had the X-ray? We have been over these various ramifications for a long time. If she had to have an X-ray you can introduce the testimony on it.

Mr. Stahl: After you had gone to the Arizona Brace Shop, what did you do after that? I might ask you this: As a result of going there, did you use the artificial limb?

A. Well, I could never put any weight on it.

Q. What did you do then?

A. The manager there suggested that I have some X-rays made.

Mr. Baker: We move to strike it.

Mr. Stahl: Don't say what the manager said, what did you have done?

The Court: The objection is sustained.

The Witness: I had some X-rays.

Mr. Stahl: You had some X-rays by whom?

A. At the Pathological Laboratory. [48]

Q. What did you do then?

A. They were sent to Dr. Ryerson.

Q. Dr. Ryerson. Who is he?

A. He is my family doctor and his office is on McDowell Road.

Q. And then after that, after he had read the X-rays, where did you go?

A. Well, he advised me to go to Dr. Lytton-Smith.

Q. To Dr. Lytton-Smith here in Phoenix?

(Testimony of Zoa H. Zane.)

A. Yes.

Q. Out at the Grunow Clinic?? A. Yes.

Q. And you went to Dr. Smith, did you?

A. Yes.

Q. And what did Dr. Smith do?

A. Oh, he had me go to the Good Samaritan Hospital and there my leg was put in traction and later a bone graft was fit on my hip joint.

Q. On your hip joint? A. Yes, sir.

Q. Have you ever been able to use the artificial limb?

A. No, the bone graft collapsed right after the cast was taken off.

Q. Now, Mrs. Zane, from the time of this [49] accident until the present time, have you had any other accidents? A. No.

Q. Have you had any falls or any injuries at all?

A. No, sir. Oh, I fell once after the first X-rays were taken.

Q. That was after you had seen Dr. Lytton-Smith?

A. Yes, that was even after the operation a long time.

Q. After Lytton-Smith's operation?

A. Yes.

Q. Now, I believe you stated you paid the hospital for care and treatment after the settlement of \$140.90, is that correct? A. Yes.

Q. Do you have those receipts?

Mr. Baker: Why don't you mark them for

(Testimony of Zoa H. Zane.)

identification and then I can tell better if they are to be admitted into evidence?

Mr. Stahl: All right. I might have this one marked here.

(The document was marked as plaintiffs' Exhibit 1 for identification.)

Mr. Stahl: Mrs. Zane, I will hand you [50] plaintiff's Exhibit 1 for identification and ask you when and where you received that paper?

A. Well, while I was in the hospital there at Coachella Valley, Mr. Cameron, the claim agent, handed it to me after we signed the release.

Mr. Baker: What was that?

(The answer of the witness was read by the reporter.)

Mr. Baker: Do I understand you to say that Mr. Cameron handed you this receipt?

The Witness: Yes.

Mr. Baker: I don't have any objection.

Mr. Stahl: I offer it in evidence.

(The document was received as plaintiffs' Exhibit 1 in evidence.)

PLAINTIFFS' EXHIBIT No. 1

COACHELLA VALLEY HOSPITAL
330 Miles Avenue
Indio (Phone 2741) Calif.

Receipt Date Feb. 19, 1943 708
Received From Pacific Greyhound Lines
One thousand four hundred and sixty-seven Dollars (\$1,467.00).

(Testimony of Zoa H. Zane.)

For Hospitalization and Dr.'s care of Mrs. Zoa Zane, from Dec. 11th, '42, to Feb. 19, '43.

(How Paid) Check. (Balance Due):

COACHELLA VALLEY
HOSPITAL.

By A. R. MARCUM.

(Thereupon the document was read to the jury.)

Mr. Stahl: Mark this.

(A document was marked as plaintiffs' Exhibit 2 for identification.)

Mr. Stahl: Do you have any objection to this?

Mr. Baker: Why don't you qualify it? I don't know what it is for.

Mr. Stahl: I hand you plaintiffs' Exhibit #2 for identification, Mrs. Zane, and ask you what that is.

A. That was the hospital and doctor that I [51] paid at Indio.

Mr. Baker: No objection.

(This document was received and marked as plaintiffs' Exhibit Number 2 in evidence.)

(Testimony of Zoa H. Zane.)

PLAINTIFFS' EXHIBIT No. 2

90-1347 Indio Branch 90-1347

No. 3

Bank of America

National Trust & Savings Association

Indio, Calif., Mar. 7, 1943.

Pay to the Order of Coachella Valley Hospital
\$140.90 one hundred and forty and 90/100 Dollars.

ZOA ZANE.

[Stamped on Back]: Pay to the Order of the
First National Bank in Coachella, Coachella, Calif.
For Deposit Only. Coachella Valley Hospital, W. H.
Blackman, Ralph E. Pawley, Raymond O'Connell.Pay to the Order of Any Bank or Banker. Prior
Endorsements Guaranteed. H 9 1943 90-767. The
First National Bank, Coachella, Calif.

Mr. Stahl: This, gentlemen, is simply a check on
the Bank of America for \$140.90, payable to the
order of the Coachella Valley Hospital and signed
by Zoa Zane.

Q. Now, Mrs. Zane, in connection with your—the injury to your thigh, will you state what doctor bills, if any, you have incurred since you came back to Phoenix. I am just speaking solely now about your thigh-bone or hip.

(Testimony of Zoa H. Zane.)

Mr. Baker: That is not proof of the reasonable value.

Mr. Stahl: Well, we will probably have to connect that up.

Mr. Carson: What she incurred. We will have the doctor testify what took place. You got to make some showing that a bill was incurred.

The Court: Go ahead.

A. There was \$200.00 to Dr. Lytton-Smith for the operation and then there was, I think, a hospital bill of \$185.00 and X-rays.

Mr. Stahl: Did you have any other medical expenses from that operation? [52]

A. Yes. I went to Los Angeles last summer to see Dr. Wilson, and I think it took about \$300.00 to go over and wait around to get an appointment with him—

Mr. Baker (Interrupting): Just a minute. I think I ought to object to that, where she went to Los Angeles to see Dr. Wilson. Unless there is some showing that there was a necessity for it—she wasn't satisfied with Dr. Lytton-Smith.

Mr. Carson: Dr. Lytton-Smith sent her over there.

Mr. Stahl: Under whose instructions and suggestions did you see Dr. Wilson at Los Angeles?

A. Dr. Lytton-Smith suggested I go over there and see Dr. Wilson.

Q. Was that after—

Mr. Baker (Interrupting): I still object to that, if the Court please.

(Testimony of Zoa H. Zane.)

The Court: It may stand.

Mr. Stahl: Was that after Dr. Lytton-Smith's operation? A. Yes, that was afterwards.

Q. Now, have you been required, Mrs. Zane, to employ help at your home on account of having to use the crutches?

A. Yes, I have. I spent three months in [53] bed and that took quite a bit of money to get somebody to stay then, and ever since then, why I had part-time help anyway.

Q. Do you know how much that amounted to?

A. Well, probably around \$700.00.

Q. Do you know what the X-rays in connection with your thigh and hip injury cost you?

A. No, I couldn't say right off-hand. I guess it was about a hundred dollars, I guess, or maybe more—

Mr. Baker (Interrupting): Just a minute. We move to strike that.

Mr. Stahl: It may be stricken.

The Court: It may be stricken.

Mr. Stahl: Would you be able to say how much it was as a minimum amount; was it at least so much or not?

A. Yes, I imagine it would be about a hundred dollars.

Mr. Stahl: It is not what you imagine. Can you ascertain this and let us know?

Mr. Baker: There is a proper way for doing that, if the Court please.

The Court: Well the objection is sustained.

(Testimony of Zoa H. Zane.)

Mr. Stahl: Mrs. Zane, since you left the hospital in Los Angeles, will you state whether [54] you had had any pain in your upper leg?

A. You mean, in Indio?

Q. After you left Indio, yes.

A. Yes, I had pains before and I still—my hip still bothers me, my hip and knee.

Q. You have had ever since you returned to Phoenix? A. Yes, sir.

Q. What is the nature of those pains?

A. Well, they are just pains. I may have my leg a certain way, why, it is quite painful, and usually at night it bothers me more than during the day.

Q. And have you been able to get around except on crutches? A. No.

Q. Will you state in what other ways besides not being able to work or get around without crutches, in what other way has this bothered you, if at all?

A. Well, I can't be a mother to my children such as I should be, or a wife either to my husband.

Q. Are you able to perform your household work?

A. A part of it, not all. The heavier work I am unable to do. [55]

Q. Now, you said about not being able to be a wife to your husband. What do you mean by that?

A. Well, regular relations between man and wife.

Q. You have not been able to do that since this accident?

(Testimony of Zoa H. Zane.)

A. Well, we tried it but it was just too painful to me.

Q. Have you had any children since the accident? A. No.

Q. After you made this settlement, I believe you said up to the time you made the settlement you were in a private room? A. Yes, sir.

Q. And after the settlement was made, where did you stay, at the hospital?

A. Yes, I suggested I be moved into a ward.

Q. And were you moved into a ward?

A. Yes.

Q. You stayed there for the remainder of your time? A. Yes.

Q. When was the first time, Mrs. Zane, that you knew you had an injury to your thigh-bone and hip and you would be unable to wear an artificial limb? [56]

A. It was in August, 1943, when I had the X-rays made at the Pathological, and that was the first time that I knew it.

Q. This money that you received, Mrs. Zane, I believe you alleged in your complaint about, or what you did with the money, \$14,500.00. What did you use that for?

Mr. Baker: Just a minute. I object to that. I am going to cross-examine her. That, certainly, is not direct.

Mr. Stahl: We alleged in our complaint in reference to tender.

The Court: There would have to be some limit

(Testimony of Zoa H. Zane.)

to that. We are not particularly interested in every cent of money she spent.

Mr. Stahl: I don't know that we will go into detail. In general, what did you do with the money you received? I don't care for the details of it.

A. Well, we bought a home and we are settled in it, and the hospital and doctors' bills and household help.

Q. And this was done before you knew about the injury to your thigh?

A. Yes, we bought a home before this.

Q. And these other expenses that you paid out?

A. Yes.

Mr. Stahl: I believe that is all.

Cross Examination

Mr. Baker:

Q. This accident occurred about December 10th or 11th, was it? A. December 11th.

Q. The morning of December 11th, was it not?

A. Yes.

Q. And in the vicinity of Indio, California?

A. Yes, sir.

Q. Which side of Indio, on the Los Angeles side or the Phoenix side? A. Los Angeles.

Q. How far from Indio did the accident occur?

A. I think it was about seventeen miles from Indio.

Q. About seventeen miles from Indio?

A. I think so.

Q. And I believe you testified that you were thrown out of the bus, were you? A. Yes.

(Testimony of Zoa H. Zane.)

Q. And then some soldier helped you, picked you up or something?

A. Well, he helped me to lay down and they [58] put a tourniquet on my leg.

Q. How many other persons were injured in that same accident, passengers?

A. There were two killed.

Q. How is that?

A. There were two killed.

Q. Some killed? A. Yes.

Q. And a large number injured, were they not?

A. No, I don't think there was such a great number.

Q. Would you say there were eighteen or twenty of them injured? A. No.

Q. There were several injured, were they not?

A. Five or six, possibly.

Q. Five or six, that is all you know about?

A. Yes.

Q. You see Mr. Parks right over there who sits on my right? A. Yes.

Q. You did see him at Indio?

A. Not that I remember of.

Q. Now, how were you taken from the scene of the accident to Indio, to the hospital? [59]

A. By ambulance.

Q. And what ambulance was that, do you know?

A. No, I don't.

Q. They were Army ambulances, weren't they, or do you know?

A. The one I was taken in was not.

(Testimony of Zoa H. Zane.)

Q. What kind was it, do you know?

A. It was from a mortuary funeral home.

Q. Do you know whether some Army ambulances were there taking the injured to the hospitals. A. I don't know.

Q. That, you don't remember? A. No.

Q. And you were taken to the hospital in a mortuary ambulance, is that right? A. Yes.

Q. And you were taken to the Coachella Valley Hospital? A. Yes.

Q. Coachella. Is there another hospital there in Indio? A. Yes, I believe there is.

Q. Some of the patients were taken to the other hospital, were they not? A. I think so.

Q. That is, some of the passengers that were [60] injured in this bus accident were taken to the other hospital there at Indio? A. Yes.

Q. And some went to the same hospital that you did? A. Yes.

Q. Now, after you arrived at the hospital, who was the first person you contacted, if you remember?

A. You mean, in the hospital who was the first person I saw?

Q. Yes, in the hospital. A. Was a nurse.

Q. And did you have your child with you at that time? A. Yes.

Q. And you took your child also to the hospital?

A. Yes.

Q. The child suffered a few minor injuries of some sort? A. Yes.

(Testimony of Zoa H. Zane.)

Q. Did he not? A. Yes.

Q. Nothing serious?

A. No, there was nothing serious. [61]

Q. Well, how long after you were in the hospital did you determine the seriousness of your injuries or the extent of your injuries?

A. Well, in a very short time they told me they were going to amputate my leg and foot.

Q. How long would you say?

A. I don't know.

Q. After you arrived?

A. It was some time that morning that I was taken in.

Q. Well, did they amputate your leg within an hour after you arrived at the hospital?

A. I don't know whether it was within an hour or two.

Q. It was very soon after you arrived, anyway, was it not? A. Yes.

Q. You were told that your fracture of the lower leg was such that they had to amputate immediately, that was true, wasn't it? A. Yes.

Q. It was just mashed to pieces, your leg below your knee?

A. I don't know, I didn't see it.

Q. They had to act very quickly? A. Yes.

Q. And very promptly in order to save your life, didn't they? A. Yes, I guess they did.

Q. Now, I believe you stated at the time—strike that, I will re-frame the question. You stated that an X-ray was taken at the Indio hospital?

(Testimony of Zoa H. Zane.)

A. Yes.

Q. Before the time that your leg was amputated?

A. I don't know what they did before they amputated. I don't think there were any X-rays taken.

Q. Oh, well, you spoke about an X-ray being taken. Where was that taken, do you know?

A. That was after my stump had been fixed up.

Q. Oh. So you don't know whether an X-ray was taken before the amputation or not?

A. No, I do not.

Q. Now, after your leg was amputated, you stated that a subsequent operation was performed upon your leg, is that true?

A. Yes, there was a second operation on my leg.

Q. Now, when was that second operation?

A. I think it was about six weeks after the [63] first.

Q. About six weeks after the first operation, and what was the necessity for that second operation, Mrs. Zane?

A. Well, that was to enable me to wear an artificial limb. They took some more bone out and fixed a pad at the end of my leg for protection when I was fitted up with an artificial.

Q. So, first your leg below your knee was amputated and then six weeks later an operation was performed on the same leg for the purpose of suit-

(Testimony of Zoa H. Zane.)

ing for an artificial limb, is that right; that was the purpose of it? A. Yes.

Q. Who performed both of those operations?

A. Dr. Blackman.

Q. Both the amputation and the second operation? A. Yes.

Q. And did he advise you—did he tell you that the second operation was to make your leg suitable for an artificial limb? A. Yes.

Q. He is the one that told you? Now, before that time, had he—had you had these conversations concerning who was going to pay these bills that [64] you referred to, the Pacific Greyhound Lines to pay these bills? A. Yes.

Q. In other words, you have testified about some conversations that you had with Dr. Blackman, I believe, and Mr. Cameron, in which I believe the inference was given to you that the Pacific Greyhound Lines was going to pay all of these medical bills and the cost of this operation, is that right?

A. Yes.

Q. And you were so advised before this second operation that we are talking about, is that right?

A. Why, certainly.

Q. Now, Mrs. Zane, after your amputation had been effected and completed, describe what pains you suffered in your right leg.

A. Well, there was more like the muscles jerking, kind of a spasmodic pain of the muscles and there was all up in my right leg.

(Testimony of Zoa H. Zane.)

Q. And did you suffer pains continuously during all that time in that right leg?

A. Well, yes, every day. A whole lot depended on the position I was in, and any movement caused pain.

Q. Where was that pain, in your knee?

A. There was all in my leg. It hurt so bad [65] I don't know where it hurt.

Mr. Baker: What was that answer?

(The answer was read by the reporter.)

Mr. Baker: It hurt so bad you didn't know where it hurt? A. Yes.

Q. You say the pain was that extreme and so severe you could not determine the exact locality of it, is that correct? A. Yes.

Q. And that was continuously up until the time of your second operation, is that right?

A. Well, it still hurts like that at times.

Q. Well, you might answer my question and we will get to those various times as we go along.

Mr. Carson: Well, she has answered the question as best she can. He has just asked a question where he assumed a state of facts that didn't exist. She has a right to answer.

The Court: He asked her if it was that way up until the time of the second operation. You may answer the question. A. Yes, it did.

Mr. Baker: How about after the second operation, did that extreme pain continue A. Yes.

Q. Up until the time you left the hospital?

A. Yes.

(Testimony of Zoa H. Zane.)

Q. Continuously?

A. No, I don't say continuously. I say, most any moment, and I said a whole lot of it depended on the position I was in.

Q. You suffered great discomfort all the time?

A. Yes.

Q. When did you first see Mr. Cameron?

A. It was about three or four days after I was admitted to the hospital in Indio.

Q. How did you come to meet him? Somebody bring him in and introduce you, or what?

A. Yes, the nurse brought him in and introduced him as an agent from the Greyhound, and he also gave me a card that had Mr. Cameron, his name on it, and it said, "Claims Agent," or something of that sort.

Q. Greyhound Lines?

A. Yes, Pacific Greyhound Lines.

Q. So he handed you a card?

A. Yes, sir.

Q. And he was introduced to you, is that right?

A. Yes. [67]

Q. And did he tell you what his purpose was for meeting you?

A. Well, not at that time he didn't.

Q. What did he say; what was the first conversation you ever had with Mr. Cameron? What did it amount to? Nothing but an introduction, wasn't it, that is what I am getting at.

A. Yes, more or less it was just an introduction. He asked how I was getting along.

(Testimony of Zoa H. Zane.)

Q. He was solicitous of your welfare, was he not, Mrs. Zane? A. Yes, he was.

Q. Very solicitous, that is correct, isn't it?

A. Yes.

Q. I believe he stated that he wanted to see that you were well taken care of? A. Yes.

Q. And I believe you testified before that he also said he was taking care of the passengers that were injured in that wreck, did he not, trying to, anyway? A. I beg your pardon?

Q. I think you testified in your examination in chief, as I recall it, that he told you that he was taking care of all the passengers that were [68] injured in that wreck.

Mr. Carson: I don't think that is in the record at all.

Mr. Baker: Something to that effect.

The Court: I don't remember it.

Mr. Carson: I don't remember it. I don't think it is in evidence at all, except put in evidence by Mr. Baker.

The Witness: I don't remember.

Mr. Baker: Well, do you know whether or not he was visiting the other patients there who had been injured in that same wreck?

Mr. Carson: When do you mean?

Mr. Baker: I don't know when.

The Witness: You mean the first time?

Mr. Baker: I was not there, Mr. Carson.

Mr. Carson: Well, will you describe the time, Mr. Baker?

(Testimony of Zoa H. Zane.)

The Court: Well, at the time she was there.

Mr. Carson: I understand—

The Witness (Interrupting): Do you mean, the first time he came that he told me that?

Mr. Baker: Well, do you know whether or not he visited the other patients? A. Yes.

Q. You knew that, didn't you? [69]

A. I knew what?

Q. That Mr. Cameron visited the other people there. A. Yes.

Q. You knew that, didn't you? A. Yes.

Q. Well, when was the next time you saw Mr. Cameron?

A. Oh, it was probably within a week.

Q. The hospital again? A. Yes.

Q. And at that second time he called upon you, was he also calling upon the other people there?

A. I don't know.

Q. You don't know that? A. No.

Q. Well, on this second visit by Mr. Cameron, what was the conversation?

A. Well, the first time or two he came, why, he just was friendly.

Q. Just friendly?

A. Yes, and he assured me there was nothing to worry about, that they were taking care of all the bills. All I had to do was to get well.

Q. Again he was friendly and solicitous of [70] your welfare? A. Yes.

Q. That was the second time he called on you. Now, the third time he called upon you?

(Testimony of Zoa H. Zane.)

A. I can't enumerate the times he came. He was there quite often.

Q. Would you say it was still another week farther on, another week later?

A. Probably so. There at first, why, his visits were about a week apart.

Q. And during those first three or four visits, did he urge you to accept any settlement for your injuries?

A. Oh, he didn't urge me, no, but he was kind of preparing his ground.

Q. Well, now, what did he say? Did he ask you to name a figure, or did he name any figure to you, we will say, the first three times he visited you?

A. Well, he told me about the cases he had settled and about the two people that lost their lives and how much was settled on them. He said they settled ten thousand on each of them.

Q. He never asked you to name a figure at all at first, did he? A. No, not at first. [71]

Q. And he never made any offer to you, did he?

A. Well, I told him I would not want ten thousand dollars.

Q. Well, I mean, he never made an offer of any kind? A. No.

Q. I am saying the first three times he called on you? A. No.

Q. When was the first time there was any discussion of a settlement with you to compensate you for your injuries?

(Testimony of Zoa H. Zane.)

A. Well, I think it was right after the second operation that—

Q. (Interrupting): Right after the second operation? A. Yes.

Q. That would be a matter of about six weeks before Mr. Cameron ever attempted to settle this case with you, that is a fact, is it?

A. Yes, I guess it is.

Q. But you felt assured that you were going to be compensated, did you not, Mrs. Zane?

A. Oh, yes.

Q. There was no question about that at all [72] was there, any time? A. No, there wasn't.

Q. None whatever but what the Greyhound Lines were going to compensate you for the injuries, there never was a question about that in the world, was there? A. No.

Mr. Carson: He has asked that question two or three times.

Mr. Baker: So you say the first conversation was about six weeks right after the second operation that you identify as six weeks after you went into the hospital. What was said in that time with reference to compensating you for your injuries by Mr. Cameron?

A. He asked me how much I'd settle for and I told him \$50,000.00.

Q. That offer, of course, was refused?

A. Yes.

Q. Well, when did you have the next conversation concerning settlement?

(Testimony of Zoa H. Zane.)

A. Oh, I don't know.

Q. We refer now to this \$50,000.00 conversation. When was your next settlement for \$50,000.00 conversation?

A. When I told him that, why, he told me [72-A] right off.

Q. I am asking you when was the next conversation after the \$50,000.00 conversation?

A. Oh, it was within a week anyway.

Q. About a week? A. Within a week.

Q. Did you see Mr. Cameron then?

A. Yes.

Q. Did you have a conversation with him?

A. Yes, I suppose so.

Q. What was that conversation at that time?

A. Well, first I had asked him about twenty-five thousand and he had asked the head office about it, I guess, anyway he came back and said they would not settle for anything like that, and he offered me twelve thousand, I think it was, or twelve thousand five hundred, and I told him that—I don't know whether it was at that time or not that I told him I couldn't take it, or I would have to talk it over with my husband or something.

Q. Well, did you talk it over with your husband? A. Yes, I suppose so.

Q. You had seen your husband quite often before that? A. Oh, yes. [73]

Q. He was frequently in Indio? A. Yes.

Q. And he visited you every time he was in Indio, did he not? A. Yes.

(Testimony of Zoa H. Zane.)

Q. All questions of settlement you discussed with your husband, did you not, Mrs. Zane?

A. Yes.

Q. He was fully advised of all negotiations, was he not? A. Yes.

Q. All right. Now, you say you arrived to the point where an offer of \$12,000.00 was made by Mr. Cameron, is that right? A. Yes.

Q. Now, what was the next conversation—what was the next development in that respect?

A. Well, he started coming back so often then that I could not enumerate the times or tell what conversations we had.

Q. Well, I think you said in some place in your examination that finally you agreed to accept fifteen thousand, did you not? A. Yes.

Q. Did you send him a telegram to that effect to Los Angeles? [74]

A. Yes, I guess I did, since you mention it.

Mr. Baker: Mark this for identification, please.

(The document was marked as Defendant's Exhibit A for identification.)

Mr. Baker: I am handing you Defendant's Exhibit A for identification, Mrs. Zane, and will ask you if you sent that telegram to Mr. Cameron?

A. (Looking over document): Yes, I did.

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was received as defendant's Exhibit A in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT A

[Western Union Telegram]

ZUB6 8 Collect XC—Indio Calif 731P Jan 29—
Wm. Cameron—C382 36 85 1943 Jan 29 PM 10 01
621 S Hope St LosA—Rf

Will Settle for 15000 Plus Hospital Expense—Mrs

Zoa Zane.

15000....

Mr. Baker: I will read this to you, gentlemen.

(Thereupon Defendant's Exhibit A in evidence was read to the jury by Mr. Baker.)

Mr. Baker: Now, how long after that was it before this settlement was finally effected?

A. Well, it was—we signed the release on the 19th of February.

Q. Three weeks after that, wasn't it?

A. Yes.

Q. Three weeks after you sent the telegram of January 29 telling him that you would take \$15,000.00, plus hospital expenses in settlement? [75]

A. Yes.

Q. And the settlement was made and that is exactly what was paid to you, wasn't it, Mrs. Zane, \$15,000.00 plus your hospital expenses?

A. No.

Q. You were paid \$14,500.00 and \$500.00 for your child, weren't you? A. Yes.

(Testimony of Zoa H. Zane.)

Q. And your hospital expenses, that is a fact, isn't it; that is exactly what you were paid, isn't that true, Mrs. Zane? A. Yes.

Q. In other words, the settlement was effected exactly according to your own request, was it not?

A. It looks like it, yes.

Q. How long would you say you discussed this matter with your husband before you finally effected the settlement?

A. Well, I discussed it with him before I sent the wire, and maybe—

Q. (Interrupting): You discussed it with him before you sent that telegram, did you?

A. Yes, and immediately after that he left town.

Q. I mean, you had discussed the matter with him before you sent that telegram? [76]

A. Yes.

Q. And he approved of your sending that telegram, did he not?

A. Yes, he said it was up to me.

Q. Now, between January 29 and February 19, did you see Mr. Cameron again? A. Yes.

Q. You did? A. Yes.

Q. For what purpose?

A. He would come to Indio to see—well, at first he fixed the release up and brought it down and Jack was out of town, so he left it.

Q. When did he leave this so-called release you are talking about?

A. Well, I don't know just when.

(Testimony of Zoa H. Zane.)

Q. Could you approximate the date—let's take the date of that telegram?

A. It was probably within three days anyway after that.

Q. Now, you say that he left the release with you? A. Yes.

Q. It was all made out? A. Yes.

Q. Was it on a printed form? [77]

A. Yes.

Q. Did you sign that?

A. I was led to believe I signed the one that he—

Q. (Interrupting): Well, did you sign that?

A. I signed a release, yes.

Q. You signed a release? A. Yes.

Q. Did you sign the one he left with you?

A. No.

Q. You did not? A. No, I didn't.

Q. What became of that?

A. That is what I'd like to know.

Q. You say he left it with you, did he?

A. Yes.

Q. What became of it?

A. He took it back with him.

Q. What?

A. He took it back the day we signed the releases.

Q. He took it? A. Yes.

Q. The day you signed the release, is that right?

A. We signed the release.

(Testimony of Zoa H. Zane.)

Mr. Baker: Mark this for identification, [78] please.

(The document was marked as Defendant's Exhibit B for identification.)

Mr. Baker: Handing you Defendant's Exhibit B for identification, Mrs. Zane, I will ask you if that is your signature?

A. (Looking over document): Yes.

Q. Is that the signature of your husband, Jack Zane? A. It looks like it.

Q. At the time this was executed was it witnessed by anybody? A. Yes.

Q. By whom? A. Mrs. Markham.

Q. And by who else?

A. Mr. Cameron.

Q. Is that their signatures attached thereto?

A. I wouldn't know.

Q. Weren't they signed in your presence?

A. Yes.

Q. They were signed in your presence and those signatures were appended in your presence, were they not? A. Yes.

Mr. Baker: We offer it in evidence. [79]

Mr. Carson: We would like to look at it.

Mr. Baker: Yes, sir.

The Court: Any objection?

Mr. Carson: No, with this exception, that subject to our claim that it is not the release she had in her possession over in Los Angeles.

The Court: We are interested in this one now. May be received.

(Testimony of Zoa H. Zane.)

(Document was received as Defendant's Exhibit B in evidence.)

DEFENDANT'S EXHIBIT B

RELEASE IN FULL

IPGL-2251-B

Received of Pacific Greyhound Lines the sum of Fifteen thousand nine hundred sixty-seven and 00/100 Dollars (\$15,967.00) in consideration of which sum we hereby release and discharge Pacific Greyhound Lines of and from any and all claims and demands which we now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at Point on U. S. Highway # 99, near Indio, California, resulting in personal injury and property damage.

It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

(Testimony of Zoa H. Zane.)

Dated at Indio, Calif., this 19 day of February,
1943.

ZOA ZANE (L. S.)

JACK ZANE (L. S.)

M. CAMERON,

Witness.

ALPHA R. MARCUM,

Witness.

This release should not be signed unless read by
or read to the person signing same.

State of

County of—ss.

On the day of,
19...., before me personally appeared.....
..... to me
known and known to me to be the same person men-
tioned and described in and who executed the above
instrument and..... acknowledged to me
that.....executed the same.

.....
Notary Public.

Section 1542 of the Civil Code referred to in the
above release reads as follows:

“1542. Certain claims not affected by general
release. A general release does not extend to claims
which the creditor does not know or suspect to ex-
ist in his favor at the time of executing the release
which if known by him must have materially af-
fected his settlement with the debtor.”

Form 71008C 15M 1041 (S&C)

(Testimony of Zoa H. Zane.)

Mr. Baker: I will read Defendant's Exhibit B.

(Thereupon Defendant's Exhibit B in evidence was read to the jury.)

Mr. Baker. Mrs. Markham was the nurse there, was she not; one of the nurses at the hospital?

A. Yes.

Q. And Mr. Cameron, the gentleman you have been speaking about, effected the settlement with you, is that correct? A. Yes.

Q. How long was Mr. Cameron with you on this day, February 19, before you finally executed this release?

A. Oh, I don't know. He came down and wanted to know if we were ready to sign the release [80] or if we had already signed it, and which we had not, and he said, 'Well, he would go out and figure out the hospital and doctor bills', and then he and Mrs. Markham came back into the room.

Q. Your husband was there all that time, was he? A. Yes.

Q. Did you discuss the terms of the release before it was signed on that day, that particular day? A. Yes.

Q. It was discussed between you, is that right?

A. Yes, we discussed it.

Q. In the presence of your husband?

A. Yes.

Q. And Mr. Cameron?

A. I don't know about Mr. Cameron.

(Testimony of Zoa H. Zane.)

Q. Well, your husband was there?

A. Yes.

Q. I believe you stated that you had consulted no attorney in the matter? A. No.

Q. Therefore, you didn't have to pay any attorney's fees, did you? A. Yes, that is right.

Q. Whatever you received was absolutely clear and clean, is that right? A. Yes.

Q. How did Mr. Cameron pay you the sum of \$15,000.00? A. By check.

Q. \$15,900.00? A. He didn't pay me that.

Q. He didn't pay you?

A. He paid me fourteen thousand, five hundred.

Q. He paid you fourteen thousand, five hundred? A. Yes, by check.

Mr. Baker: Mark this for identification, please.

(The document was marked as Defendant's Exhibit C for identification.)

Mr. Baker: I hand you Defendant's Exhibit C for identification and ask you if that is the voucher for fourteen thousand, five hundred which was paid you on that date? A. Yes, this is it.

Q. Is that your signature, Zoa Zane?

A. Yes.

Q. Also the endorsement, is that your signature, Zoa Zane? A. Yes. [82]

Q. You signed it twice? A. Yes.

Q. Your husband signed it twice, Jack Zane, and also the Coachella Hospital signed it, didn't they? A. Yes.

(Testimony of Zoa H. Zane.)

Q. All three of you; that is, you, your husband and the hospital, all three signed that voucher, didn't they, for \$14,500.00. Is that correct?

A. Yes.

Mr. Baker: We offer it.

Mr. Stahl: No objection.

(The document was received as Defendant's Exhibit C in evidence.)

(Thereupon Defendant's Exhibit C in evidence was read to the jury by Mr. Baker.)

DEFENDANT'S EXHIBIT C

Read Carefully

If blank spaces in Receipt and Release below are filled in Signatures must be affixed by all Payees before draft will be honored.

RECEIPT AND RELEASE

In Consideration of the sum of Fourteen thousand five hundred and no/100 Dollars, the receipt of which is hereby acknowledged, the undersigned does hereby release and discharge Pacific Greyhound Lines and/or of and from any and all claims and demands which the undersigned now has or may hereafter have on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at or near the city of Indio, in state of California. It is hereby expressly agreed and understood that the payment of said sum is not, and is not to be construed as, an

(Testimony of Zoa H. Zane.)

admission on the part of said payor of any liability whatsoever in consequence of said accident.

Dated this.....day of....., 194...

ZOA ZANE

JACK ZANE

Payee Signature

COACHELLA VALLEY HOSPITAL

By W. H. BLACKMAN, M.D.

Payee Signature

[In margin]:

ENDORSEMENT

If blank spaces in Receipt and Release are filled in, the signatures to same must correspond with this endorsement or draft will not be honored.

ZOA ZANE

JACK ZANE

COACHELLA VALLEY HOSPITAL

By W. H. BLACKMAN, M.D.

(Do not detach receipt and release.)

PACIFIC GREYHOUND LINES

For the Account of.....

No. 14079

Claim Settlement Draft

Second Final

Los Angeles, Cal., February 19, 1943

Pay to the order of Zoa Zane and Jack Zane her husband and Coachella Valley Hospital \$14,500 # Fourteen thousand five hundred and no/100 Dollars

(Testimony of Zoa H. Zane.)

Kind of Loss: Bus. Occurring on December 11, 1942, at or near Indio, California.

In full settlement of any and all claims as result of above mentioned accident. Claim No. IPGL-2251-B.

WESTERN ADJUSTING BUREAU

Approved:

W. M. CAMERON

To Treasurer Pacific Greyhound Lines

Payable Thru

Bank of America

National Trust and Savings Association

11-34 San Francisco, Calif. 11-34

[Stamped]: May 11, 1943 19090

This draft will not be honored if detached from receipt and release.

[On back of Receipt and Release]

Endorsement:

Jack Zane

Ident.

Dr. Blackman

[Stamped]: Pay to the Order of Any Bank, Banker or Trust Company. All prior endorsements guaranteed. 90-1347 Feb 27 1943 90-1347 Indio, Calif. 916 Bank of America 916. Indio, Calif.

(Testimony of Zoa H. Zane.)

[Stamped]: City Collections, S. F. Central Office, No. 1, Mar. 3, 1943, 550 Montgomery St., Bank of America N. T. & S. A.

Mr. Baker: Mark this for identification, please.

(The document was marked as Defendant's Exhibit D for identification.)

Mr. Baker: What did you do with the voucher, that is, Defendant's Exhibit D in evidence, which the jurors are now examining?

A. I endorsed it and sent it to the bank at Indio. [83]

Q. When did you send it to the bank in Indio, do you know?

A. No, but it was a few days after I had got it, I think.

Q. You held it a few days, you think?

A. I think so.

Q. You didn't send it down right away?

A. No, I don't believe so.

Q. Who took it down?

A. My husband did.

Q. And did you get cash on it or did you deposit the check?

A. I got a cashier's check, I believe, or something of that sort, and I—

Q. (Interrupting) Well, you realized the cash either by an account in the bank or a cashier's check, or some other means, did you not?

(Testimony of Zoa H. Zane.)

A. Yes.

Q. You realized that \$14,500.00. Now, I hand you Defendant's Exhibit D marked for identification, Mrs. Zane, and ask you to examine the same, please. (Handing document to witness.) You recognize that, do you? A. Yes.

Q. The signatures purporting to be the signatures of Zoa Zane on that instrument are your [84] signatures? A. Yes.

Q. The signatures purporting to be the signatures of Jack Zane are the signatures of your husband, are they not? A. Yes.

Q. And that is true of the endorsement, and Dr. Blackman also endorsed that, too, didn't he?

A. I don't know. We endorsed it and turned it over to them.

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was received as Defendant's Exhibit D in evidence.)

DEFENDANT'S EXHIBIT D

Read Carefully

If blank spaces in Receipt and Release below are filled in, signatures must be affixed by all Payees before draft will be honored.

RECEIPT AND RELEASE

In Consideration of the sum of One thousand four hundred sixty-seven and no/100 Dollars, the receipt of which is hereby acknowledged, the un-

(Testimony of Zoa H. Zane.)

dersigned does hereby release and discharge Pacific Greyhound Lines and/or.....of any from any and all claims and demands which the undersigned now has or may hereafter have on account of arising out of an accident which occurred on or about the 11 day of December, 1942, at or near the city of Indio, in state of California. It is hereby expressly agreed and understood that the payment of said sum is not, and is not to be construed as, an admission on the part of said payor of any liability whatsoever in consequence of said accident.

Dated this.....day of....., 194...

ZOA ZANE

JACK ZANE

Payee Signature

COACHELLA VALLEY HOSPITAL

By W. H. BLACKMAN, M.D.

[Stamped on face]: Pay to the order of the First National Bank in Coachella, Coachella, Calif., for deposit only Coachella Valley Hospital, W. H. Blackman, Ralph E. Pawley, Raymond O'Connell.

(Do not detach receipt and release.)

[In margin]:

ENDORSEMENT

If blank spaces in Receipt and Release are filled in, the signatures to same must correspond with endorsement or draft will not be honored.

ZOA ZANE

JACK ZANE

(Testimony of Zoa H. Zane.)

COACHELLA VALLEY HOSPITAL
By W. H. BLACKMAN, M.D.

PACIFIC GREYHOUND LINES

For the Account of..... No. 14078
First Partial
Claim Settlement Draft

Los Angeles, Cal., February 19, 1943

Pay to the Order of Jack Zane and Zoa Zane,
husband and wife and Coachella Valley Hospital
and Dr. W. H. Blackman \$1467# One thousand
four hundred sixty-seven and no/100# Dollars.

Kind of Loss: Bus, occurring on December 11,
1942, at or near Indio, California, in full settlement
of Hospital and medical bills for Zoa Zane to and
including 2/19/43. Claim No. IPGL-2251-B.

WESTERN ADJUSTING BUREAU
Approved

W. M. CAMERON

[Stamped]: May 11, 1943.

To Treasurer Pacific Greyhound Lines

Payable thru

Bank of America

National Trust and Savings Association

11-34 San Francisco, Calif. 11-34

This draft will not be honored if detached from
Receipt and Release.

(Testimony of Zoa H. Zane.)

(Thereupon Defendant's Exhibit D was read to the jury by Mr. Baker.)

Mr. Baker: That paper which is Defendant's Exhibit D which I just handed to the jury to examine, Mrs. Zane, was that the amount of the hospital and medical expenses up to the date of settlement, was it not? A. Yes.

Q. What was done with that voucher after you signed it—I will withdraw that. Was this voucher delivered to you at the same time as the first voucher for fourteen thousand, five hundred? [85]

A. Yes.

Q. Both vouchers were delivered to you at the same time, is that correct? A. Yes.

Q. What did you do with the second voucher—I will refer to it as the second voucher, which is Defendant's Exhibit D, am I right?

The Clerk: "D" is right.

The Witness: We endorsed it and turned it over to Mrs. Markham.

Mr. Baker: Turned it over to the hospital?

A. Yes.

Q. Endorsed it first and turned it over to the hospital? A. Yes.

Q. Do you know what became of it after that?

A. No.

The Court: We will have our afternoon recess. Keep in mind the Court's admonition.

Thereupon a short recess was taken.

After recess, all parties as heretofore noted being present, the trial resumed as follows:

Mr. Carson: In view of the situation, Mr. Baker, I believe we will ask that Dr. Lytton-Smith be called.

The Clerk: Dr. Lytton-Smith, will you come [86] up and be sworn, please.

DR. JAMES LYTTON-SMITH

was called as a witness on behalf of the Plaintiffs, and being first duly sworn testified as follows:

Direct Examination

Mr. Carson:

Q. Doctor, will you state your name, please?

A. James Lytton-Smith.

Q. What is your occupation?

A. Orthopedic surgeon.

Q. How long have you practiced—

Mr. Baker (Interruptiong): We will admit the qualifications of Doctor Lytton-Smith as an orthopedic surgeon.

Mr. Carson: All right, then. You are a member of the American College of Surgery, are you not?

A. Yes, sir.

Q. Doctor Lytton-Smith, do you know Mrs. Zane, the plaintiff? A. Yes.

Q. Do you remember about when you first met her?

A. About the 27th of September, 1943.

(Testimony of Dr. James Lytton-Smith.)

Q. Do you remember the occasion of how you [87] came to meet her?

A. She was referred to me for examination by Dr. Ryerson.

Q. And what was done then, Doctor, do you know, or did you get some X-rays at that time?

A. As I recall it, Dr. Ryerson had taken X-rays and she had X-rays with her.

Q. Do you know what those X-rays show?

Mr. Baker: Just a minute, we object to that, if the Court please, not the best evidence.

Mr. Carson: Well, your Honor, we sent some of those X-rays, they were sent over to Dr. Wilson in Los Angeles and we found out they are not here. We tried to locate them and don't know where they are, the first ones that were taken, and I don't know—

Mr. Baker (Interrupting): That is not an excuse. Duplicates could be made, I suppose.

Mr. Carson: If duplicates could be made of X-rays, I don't know it. Can duplicates be made of X-ray plates?

The Witness: Yes.

Q. Doctor, what was her condition when you first—when she first came to you?

A. She had, aside from the amputation which had been performed, she had a fracture of the neck [88] of the right femur.

Mr. Carson: Doctor, I will show you a couple of X-rays here—may those be marked for identification?

(Testimony of Dr. James Lytton-Smith.)

(Thereupon the documents were marked as Plaintiffs' Exhibit 3 and Plaintiffs' Exhibit 4 for identification.)

Mr. Carson: Doctor, will you explain what the right femur is, or what you found?

A. Well, the femur is the thigh-bone. The head of the femur rotates in the hip joint, or what we call the acetabulum. There are two common types of fracture in the upper portion of the femur. One is the intraperiosteal type, which always keeps solid because it always has a good supply of blood. The other is the neck of the femur which occurs inside of the capsule of the joint, and in this particular fracture there is a large percentage of disability even with the best treatment, because the blood supply sometimes does not establish over and across into this ball portion of the head. Now, if that does not re-establish the blood supply, the bone absorbs and a union does not occur. Then the shaft rides upwards and it plays freely without any joint. In other words, the weight would then be borne by the [89] muscles that are attached to the trochanter, and this was the type of fracture she had in the neck of the femur.

Q. Now, can you describe this hip-joint up here, how it fits in or what is the contour of it?

A. Can I use a blackboard?

Mr. Carson: Yes, the blackboard.

A. (The witness illustrates on blackboard.) Roughly, this is the side of the pelvis and this is

(Testimony of Dr. James Lytton-Smith.)
the joint surface and this is the head of the femur.
Here is where the fracture occurred.

Mr. Baker: On Plaintiffs' Exhibits 3 and 4, which are X-ray pictures, by stipulation with Mr. Carson, I agreed with him that I would not compel the presence of the Navy doctors in San Diego who identified the taking, as you express it, of these photographs. The only thing, my stipulation is limited to this, that I admit that these X-ray photographs were taken by the United States Navy Hospital at San Diego on May 13th, 1944.

Mr. Carson: And they are of Zoa Zane?

Mr. Baker: And they are of Zoa Zane.

Mr. Carson: With that stipulation they can be admitted for whatever they are worth.

Mr. Baker: Whatever they are worth. Wait a minute, I am not admitting as to the authenticity. [90] I am admitting that they were taken at the Naval Hospital on May 13th, 1944.

Mr. Carson: Doctor, here are two X-ray pictures I think you have seen before. Those are the photographs, the X-ray pictures of Zoa Zane's femur, the thigh-bone, are they not?

A. They look identically like the ones I have seen of her.

Q. Now, what does that show, Doctor, those photographs?

Mr. Baker: Just a minute, I object to it. These photographs were taken after the testimony that the operation was performed on Mrs. Zane.

Mr. Carson: That is very true, we admit that.

(Testimony of Dr. James Lytton-Smith.)

Mr. Baker: Those were not taken until May 13th, 1944.

Mr. Carson: Do they show the fracture—

Mr. Baker (Interrupting): Just a minute. I have made my objection, if the Court please.

The Court: He may answer and you can cross examine.

Mr. Carson: All right. What do they show, Doctor?

A. They show a fracture of the neck of the femur with re-absorption, and in reference to this it appears that bone graft has been attempted. [91]

Q. What did you do in your attempt to cure this thing, if you will tell, please?

A. When we have a fracture of this type of long standing, one that has been present for some time, there are several procedures which we can attempt to carry out. One of them is the insertion of a bone graft through here, from the trochanter over into the head. If this graft becomes violent or lives, then it will establish a blood supply for the head, and when it establishes a blood supply for the head, we can expect a union to occur here.

That was the procedure that we attempted on Mrs. Zane. Before we did that, however, this portion was riding high; that is, the shaft was riding high, so it was necessary to put a pin through her femur, the lower portion of the thigh, and pull it with weights to bring this down into an alignment with the head; that is, the shaft with the head. Then we took the graft from the leg, from the

(Testimony of Dr. James Lytton-Smith.)

tibia and put the graft up into the head of the femur.

Now, we know that the graft didn't take, it was an unsuccessful operation. Bone graft is not always successful, and unfortunately this was one of the unsuccessful cases. We had also thought of [92] the possibility of shifting this shaft, cutting it through here, and shifting it over here to produce a large amount of callous so there would be some weight-bearing on this if this should stay violent or alive. We thought that that procedure would more likely fail than this one, and we selected the latter.

This procedure would not work now, in my opinion, because the head has become so absorbed that there would not be a possibility of establishing a union even by shifting the shaft over. We then had considered other procedures, such as taking this portion out and throwing it away and bringing this trochanter over; taking the muscles off here and transplanting them down here and putting this over into the socket and put in a vitallium socket on here. In doing that (weight could be borne, that sometimes are non-painful and with fairly good function. The reason that we have not done that is because I am very doubtful if a patient could walk with a re-constructed hip like that in the presence of an artificial extremity. Not only was there an artificial extremity to deal with, but there is also a flexion contraction of the knee, so I think

(Testimony of Dr. James Lytton-Smith.)
with the three things that it would be an impossible
situation to re-construct. [93]

There was still one other procedure which Dr. Wilson suggested in Los Angeles, where we sent her for consultation because I didn't have any more ideas what to do for her, and that was to put this over here and to fuse it and make a head in the pelvis which would give weight-bearing, but Dr. Wilson agreed that he didn't know whether she could use an artificial extremity if she had a fused hip, and I don't know whether she could or not, and I doubt it, so if she will still have to use crutches there wouldn't be much reason to fuse the hip.

Q. Doctor, do you think that she will be able to get around at all, or do you know of any remedy that could cure that condition so she could use an artificial limb?

A. The only suggestion I know of is the possible fusion of the hip.

Q. What do you think of her chance of doing that?

Mr. Baker: Oh, he has already testified to that, if the Court please.

Mr. Carson: Well, that would be rather problematical, would it not?

A. I wouldn't think there would be a very good chance. [94]

Q. Now, Doctor, from your observation of this case and the study of it, did she relate where she received her injury? A. Yes.

(Testimony of Dr. James Lytton-Smith.)

Q. What did she give as the cause, Doctor?

Mr. Baker: Well, I think I will object to that, if the Court please. The history has no place here, because she has already testified about her history. Pure hearsay under the conditions.

Mr. Carson: Then, Mr. Baker, if the doctor doesn't get the history of the case, didn't get the history of the case, and didn't diagnose it——

Mr. Baker (Interrupting): She has already testified as to the history.

The Court: Oh, we know that. She probably told the doctor the same thing.

Mr. Carson: I understand. How did she relate she received this injury, Doctor?

Mr. Baker: I think I will object to that, too, if the Court please. It is purely hearsay.

The Court: That would be hearsay.

Mr. Carson: Doctor, what is your opinion as to when this injury occurred and how it occurred?

Mr. Baker: May I ask some questions on voir dire, Doctor, before you answer that? [95]

Mr. Carson: Yes, you may.

Mr. Baker: Could you possibly answer that question without an examination of the X-rays that were made by Dr. Ryerson?

A. As to how long it occurred before those X-rays were taken?

Q. Could you possibly do that without the X-rays themselves?

Mr. Carson: Well, he saw the X-rays.

(Testimony of Dr. James Lytton-Smith.)

A. I studied the X-rays and went over them very carefully.

Mr. Baker: I know, but the X-rays are not here.

A. I—

Q. (Interrupting) Wait a minute—just a minute. You would have to confine all of your testimony to those X-rays, wouldn't you, in answering this question that he has propounded to you now?

A. I would have to base my answer on the opinion I established while studying those X-rays.

Mr. Baker: That is correct. We object, if the Court please, to the question, upon the ground that he is not qualified and it is not the best evidence. The X-rays are not before us. I can't cross examine on X-rays that are not here. [96]

Mr. Carson: You Honor, I didn't know until today that the X-rays were not here.

The Court: That is always the rule.

Mr. Carson: Listen. Certainly, if he saw the X-rays he can base an opinion on what he found at the time.

The Court: That is all right, but this may have been prepared by some other person.

Mr. Baker: Why, certainly.

Mr. Carson: Were the X-rays brought to you, Doctor?

A. Yes.

The Court: Oh, well, you can't get away from that. You can probably get the pictures of this. You can do this in an orderly way.

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: I inquired about that and I was informed I could not get them.

The Court: That does not change the rule.

Mr. Carson: Doctor, assuming these facts to be true, this hypothetical question: Assuming she was injured on December 11, 1942, in Indio, California, where her hip or her leg was amputated—in a very severe accident. Assuming that she was taken to the hospital and this amputation took place. Assuming the fact that while in the hospital the operation—her leg was amputated [97] below the knee, and assuming the facts that after she came home she suffered pain, was unable to wear an artificial limb; went to Dr. Ryerson where X-rays were taken, and assuming that no other injury occurred, what would be your opinion as to whether or not—where she received this injury.

Mr. Baker: Just a minute. If the Court please, I object on the ground that the hypothetical question calls for a conclusion of the witness; does not state all of the facts proved in evidence and fails to recite the facts which had been proved in evidence. It does not cover by any means the situation as exists from her testimony today or at this moment.

Mr. Carson: Well, Your Honor, I think the hypothetical question assumes enough facts for him to answer the question. Mr. Baker can cross examine on any portion he does not like.

The Court: You finally asked whether he could tell where she received the injury. He could not

(Testimony of Dr. James Lytton-Smith.) possibly tell that. He might tell, if he knew all the facts, how long the injury had been in existence, but he could not tell where she received the injury.

Mr. Carson: I will admit that. Doctor, [98] assuming the facts as related, how long would you state that the injury occurred or how long a space of time?

Mr. Baker: Just a minute. If the Court please, that is a little bit unintelligent. Will you read the question.

The Court: We can save a lot of time this evening when we adjourn to write out a hypothetical question and call the doctor. We will be on this all afternoon.

Mr. Baker: He can go get those X-rays.

Mr. Carson: Doctor, do you know how long it would take to make a duplicate of those X-rays, if duplicates can be made?

A. If you can find the originals you can get duplicates.

Q. If you don't find the originals, can you make a duplicate? A. No.

Mr. Carson: That is the point I am making.

Mr. Baker: There is no proof they were lost up until now. Now, they are justifiably lost.

Mr. Carson: Your Honor, could we have a recess for about fifteen minutes? I want to see if I can find out about this injury. [99]

The Court: We will adjourn presently and you can have until tomorrow morning at 10 o'clock.

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: Doctor, how long was she in the Good Samaritan Hospital, do you know?

A. According to my records she was admitted on September 28, 1943, and she was discharged on October 20, 1943.

Q. How long a period of time was that?

A. Approximately four weeks.

Q. What medical treatment did you give her while she was in the Good Samaritan?

A. I placed a scalpal traction on the right femur, about sixteen pounds and then did the bone graft I described.

Q. Doctor, you did see the original X-rays, did you not? A. Yes.

Q. Taken. Now—

A. (Interrupting) No, I didn't see them taken. I saw the X-rays.

Q. You saw the X-rays. Doctor Lytton-Smith, will you tell the Court and Jury here just how this condition of having her hip fractured disables Mrs. Zane, if it does disable her?

A. Yes, I think I explained it.

Q. Will she ever—in your opinion, will she [100] ever be able to walk again or get around any more than she is now?

Mr. Baker: If the Court please, that is perfectly obvious that the lady is not able to walk.

The Court: I can't hear your objection.

Mr. Baker: I say, it is perfectly obvious, unfortunately, that the lady won't be able to walk without crutches.

(Testimony of Dr. James Lytton-Smith.)

The Court: Yes, I am afraid that is so.

Mr. Carson: I think, Doctor, you have testified that she won't be able to use an artificial limb?

A. I don't think she can.

Q. Doctor, assuming that she didn't have a fractured hip, she could use an artificial limb you would say, would you not? A. Oh, yes.

Q. Now, Doctor, when an artificial limb, a limb is fitted to a person, are they generally successful in getting around when they are fitted under modern conditions?

A. That, of course, depends on the type of amputation, the site of the amputation, the skill in applying the cross thesis, but as a general rule they are very successful. [101]

Q. As applied to her case, if she didn't have this injury to her hip, what would you say about wearing an artificial limb?

A. Oh, yes, she could wear an artificial limb.

Q. Doctor, do you know whether or not, from your examination of Mrs. Zane, she suffers any pain at the present time or physical discomfort as a result of this fractured hip?

A. I have not examined her recently, but she did complain of pain and I am certain that she probably does have pain.

Q. What does your examination show of that?

A. What is that?

Q. What does your examination show as to pain?

Mr. Baker: I will object to that. Doctor, I

(Testimony of Dr. James Lytton-Smith.)
will ask you one question on voir dire. The only time you know if they suffer pain is what the patient says?

A. That is right.

Mr. Baker: So, we object, if the Court please. The lady has been on the stand.

Mr. Carson: Well now, Doctor, naturally a fractured hip would be painful, would it not?

Mr. Baker: Well, we object to that on the [102] ground that without even suggesting it we know it to be true.

Mr. Carson: That is very true. We will have to try and get hold of those X-rays and recall Dr. Lytton-Smith.

Q. Do you remember what your expenses and your doctor bill was, Doctor?

A. No, I do not.

Q. You don't remember. You don't know what the hospital bill was. You would have to find that out from the Grunow Clinic.

A. I would have to call my bookkeeper. I don't have any idea.

Mr. Carson: Well, we will have to recall Dr. Smith tomorrow on this X-ray stuff, your Honor. With that I am through for the rest of the day.

Mr. Baker: I don't care to cross examine until his examination in chief is complete.

The Court: Very well.

(Whereupon, the witness was temporarily excused.)

ZOA H. ZANE

resumed the witness stand and testified further as follows:

Cross Examination Resumed

Mr. Baker: [103]

Q. Mrs. Zane, what date, do you remember, you left the hospital?

A. On March 8, I believe, 1943.

Q. And who paid the hospital bills and the expenses between February 9 and March 8, February 9, the date you executed the release?

A. I did.

Q. By check on the bank there at Indio?

A. Yes.

Q. Is that a part of the money that had been paid you in settlement? A. Yes.

Q. By the Pacific Greyhound Lines?

A. Yes, sir.

Q. Now, you said, Mrs. Zane, that you did not have any of this \$14,500.00 left, is that correct, that was paid you? A. No, I don't have.

Q. How was that? A. No.

Q. Well, you do have or you don't have?

A. That is correct, I don't have.

Q. You don't have any of it left?

A. No. [104]

Q. Is that correct? A. No.

Q. That \$14,500.00. Well, now, will you itemize to me exactly where that money was spent, please.

A. We bought a home.

Q. How much did you pay for your home?

A. \$5,000.00.

(Testimony of Zoa H. Zane.)

Q. And when did you buy that home?

A. In August, I believe, of 1943.

Q. You bought that in August, 1923?

A. 1943.

Q. Do you remember what date?

A. I think it was about the first, something like that.

Q. The 1st of August? A. Yes.

Q. And from whom did you purchase it?

A. From Mr. Snurr, I think that is right.

Q. Through what real estate agent?

A. I don't believe it was listed.

Q. Where is the house located?

A. 1722 W. Tonto.

Q. That is where you are now living?

A. Yes.

Q. You pay all cash for it? [105]

A. Yes.

Q. And owe nothing on the house?

A. No.

Q. Now, that is \$5,000.00. That leaves \$9,500.00 to account for. Now, where is the rest of it?

A. That is doctor bills, X-rays.

Q. Well, now, just count \$9,500.00 worth of doctor bills and X-rays, please. Just start listing them one by one. Now, state your first one. I will start you off. \$140.00 you paid to the Indio hospital. That is \$140.00? A. Yes.

Q. All right. Now, what is the next item you paid? A. \$200.00 to Lytton-Smith.

Q. How is that?

(Testimony of Zoa H. Zane.)

A. \$200.00 to Dr. Lytton-Smith.

Q. He said he didn't remember, but you think it is \$200.00? A. I know it was.

Q. How is that? A. Yes.

Q. Dr. Lytton-Smith. Now, what is the next item you paid?

A. Well, the hospital bill was \$185.00, I [106] think.

Q. Hospital, one hundred eighty-five. All right, what is the next item you paid for either hospital or medical expenses?

A. \$300.00 when I went to see Dr. Wilson.

Q. Do you have a bill for that or itemization for that \$300.00 item? A. No, I don't.

Q. How did you arrive at your \$300.00? By what process do you make the sum of \$300.00?

A. That is what it took to live six weeks I was over there to get an appointment and pay my transportation there and back.

Q. Do I understand that you went to Los Angeles and then waited six weeks to see Dr. Wilson?

A. Yes.

Q. You did?

A. I might not have waited six weeks, but it took that long to get gasoline back.

Q. Get your gasoline back? A. Yes.

Q. That wasn't a part of your vacation then, was it? A. It wasn't no vacation to me.

Q. Did you write him in advance and make an appointment with him? [107]

A. No.

(Testimony of Zoa H. Zane.)

Q. You did not. Do I understand it took you six weeks? You say it took you six weeks before you could see this doctor, is that correct?

A. It took more than a month to get an appointment with Dr. Lytton-Smith the first time.

Q. Well, all right. Then you knew ahead of time these doctors were pretty busy, because you say it took you over a month to get an appointment with Dr. Lytton-Smith? A. Yes.

Q. So you went to Los Angeles without making an appointment with Dr. Wilson?

Mr. Carson: That is not the record. It was Dr. Lytton-Smith who testified he directed her to go there.

The Court: No, and argumentative.

Mr. Baker: Anyway, you didn't write in advance to Dr. Wilson to try to get an appointment?

A. No.

Q. So you say that was \$300.00? A. Yes.

Q. What is your next item for expenses on medical bills?

A. Well, there is X-rays—there is a bunch of bills there for X-rays. [108]

Q. X-rays? A. Yes.

Q. What was the amount of the cost for the X-rays?

A. Oh, I don't know. There was \$10.00—\$10.00 and \$13.00 every time they were taken.

Q. You testified you were X-rayed once by Dr. Ryerson and the next X-rays were—the Naval Hos-

(Testimony of Zoa H. Zane.)

pital. That is only two. That would only be about \$25.00.

A. Dr. Lytton-Smith used about \$50.00 worth when he operated on it.

Q. If he did he doesn't know it. He used Dr. Ryerson's.

A. They were taken at the Good Samaritan. There is bills for them right there.

Q. Dr. Lytton-Smith didn't testify to any such thing.

Mr. Carson: You asked a question and she has the right to answer it, Mr. Baker.

Mr. Baker: Well, all right. Tell me what X-rays were taken and let's find out. Let's get your bills; let's find out what you paid for them. (Looking through documents).

Mrs. Zane, just to save time, at this time you don't know what you had paid for the X-rays, [109] but you will find out by tomorrow some time? Is that the extent of your medical expenses that you had?

A. Oh, I guess that it is.

Q. That covers it; that totals \$825.00, according to my computation. Mr. Jack Zane is your husband?

A. Yes.

Q. He is a wage earner, is he not?

A. Yes.

Q. And since the time you have been injured he has been either working or in the Navy, one way or the other?

A. Yes.

Q. Now, before the time of this accident at the

(Testimony of Zoa H. Zane.)

time you were married, did you have any occupation of any kind while you were married?

A. Oh, I did a little laundry work and a little waitress work.

Q. How much work did you do during your married life before this accident?

A. Oh, I don't suppose any more than three months altogether.

Q. After you left the hospital in Indio, Mrs. Zane, will you describe what pain you suffered in this right leg? [110]

A. Well, just pain. A whole lot depends on the way I move it and the way I handle it. At night especially it bothers me a lot. It seems more like muscles jerking, or something like that.

Q. The same kind of pain that you suffered during the time you were in the Indio hospital, substantially? A. Yes.

Q. That continued, did it? A. Yes.

Q. After you got home? A. Yes.

Q. You suffered great discomfort during all of that time, is that right?

A. Yes. It still is uncomfortable.

Q. But the first time you went to a doctor, I believe you said, it was sometime in the latter part of August, 1943. A. That is right.

Q. You never went to any physician or doctor before that time? A. No.

Q. Although the pain was prominent all the time? A. Yes.

(Testimony of Zoa H. Zane.)

Q. I believe you stated that the first [111] physician you consulted was Dr. Ryerson?

A. Yes.

Q. And where is his office, Mrs. Zane?

A. It is on Fifteenth Street and McDowell Road.

Q. Now, to return back to a matter, Mrs. Zane, I am now referring to this alleged release that you said Mr. Cameron left with you to be signed and which apparently was not signed, and which you said was with you several days, is that right?

A. Yes.

Q. And then finally he took it? A. Yes.

Q. You said that stated the consideration to be fourteen thousand, five hundred?

A. Yes, it was.

Q. For your release? A. Yes.

Q. Well, that would have been incorrect according to your own telegram, would it not, because you would also get your medical bills?

A. The medical bills weren't mine, they were the Greyhound's.

Q. Now, do I understand that this release that you say that Mr. Cameron left with you for some days was on a regular printed form? [112]

A. It was on a printed form, yes.

Q. Was it on substantially the same printed form as Defendant's Exhibit B;; substantially this same printed form, (Showing document to witness)? A. Yes, it probably was.

Q. But you said that in that release it was recited the injuries that you suffered?

(Testimony of Zoa H. Zane.)

A. Yes.

Q. What did it recite in that respect, what injuries?

A. It said, "Loss of right foot and lower leg".

Q. It said, "Loss of right foot and lower leg"?

A. Loss of lower leg and right foot, or something like that.

Q. And that is all it stated, was it?

A. Well, the one I had said, "All injuries known or unknown", or something to that effect.

Q. But insofar as the ink part, we will put it outside of the printed matter, the only injury recited was the loss of your right foot and lower leg?

A. Yes.

Q. Is that correct? A. Yes.

Mr. Baker: Will you mark this for identification [113] for me, please.

(The document was marked as Defendant's Exhibit E for identification.)

Mr. Baker: I am handing you Defendant's Exhibit E for identification, and you can compare that. Defendant's Exhibit E for identification is exactly the same form as the release that you signed, excluding the filled-in blanks, is it not?
(Handing document to the witness.)

(The witness looks over the document.)

Mr. Baker: That is the same form, is it not?

A. Yes, it looks like it.

Q. Will you take this pencil, please, and you write in in the proper blank there this description

(Testimony of Zoa H. Zane.)

of the injuries that you say was included in this original release that Cameron had given you.

(The witness complies.)

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was received as Defendant's Exhibit E in evidence and was read to the jury by Mr. Baker.)

DEFENDANT'S EXHIBIT E

RELEASE IN FULL

Received of Pacific Greyhound Lines the sum of
..... Dollars (\$14,500).

In consideration of which sum I hereby release and discharge Pacific Greyhound Lines of and from any and all claims and demands which I now have or may hereafter have, on account of or arising out of an accident which occurred on or about the day of , 19.. at Street resulting in loss of Right foot & Lower leg.

It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

It is further understood and agreed that the payment of said sum is not, and is not to be construed

(Testimony of Zoa H. Zane.)

as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

Dated at....., this.....day of
....., 19..

..... (L. S.)

..... (L. S.)

..... (L. S.)

.....

Witness

.....

Address

.....

Witness

.....

Address

This release should not be signed unless read by or read to the person signing same
State of..... County of..... ss.

On the.....day of.....19.., before me personally appeared.....to me known and known to me to be the same person mentioned and described in and who executed the above instrument and.....acknowledged to me that.....executed the same.

.....

Notary Public.

Section 1542 of the Civil Code referred to in the above release reads as follows:

"1542. Certain claims not affected by general

(Testimony of Zoa H. Zane.)

release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor."

Form 71008C 20M 4-42 (S&C)

Mr. Baker:

Q. So that is your injuries that were recited in that release that was handed to you? [114]

A. That is all that was recited, yes.

Q. As a matter of fact, in that same accident you suffered a fractured left ankle, didn't you?

A. Yes, I did.

Q. And that was not only known to the doctors, but Mr. Cameron saw to it that you were thoroughly treated for it in that hospital?

A. I beg your pardon.

Q. But that was fully known to the doctors and you were treated for it, weren't you?

A. Yes, the fractured ankle.

Q. That was suffered in that same accident, that is a fact, isn't it? A. Yes.

Q. So you say that this release that he handed to you didn't cover the fracture of the left ankle, is that true; is that your testimony? Do I understand that is correct, Mrs. Zane?

A. Yes, but the fractured ankle was not per-

(Testimony of Zoa H. Zane.)

manent. It was healed within two weeks; two or three weeks.

Q. Mrs. Zane, I am returning now to the question of this money, the disposal of this money that was paid you. In your complaint your attorneys have recited that the reason you have been unable to return this money to the Pacific Greyhound [115] Lines that they paid you in consideration of some provisions in this release that you gave them is, that you expended the money and was unable to return it, and that is—I am explaining that—that is why I am directing this question to you. According to the computations you have given us, I account for \$5,000.00 expended on the house and \$825.00 medical expenses. Now, what has become of the rest of the money, and furthermore, you explained to me that your husband has been a wage earner during that time. What became of the rest of the money that you are unable to make return to the Pacific Greyhound Lines?

A. Well, it has been spent.

Q. For what?

A. Well, get my cancelled checks and I will show you.

Q. So in the course of a matter of a year and a half you spent all of that money, is that right, you and your husband?

A. Well, there was almost a year I had to hire everything done.

Q. You filed this suit more than six months ago, so at that time allegedly you didn't have any-

(Testimony of Zoa H. Zane.)

thing, so we will say that in the course of two years, then, if you want to put it that way, [116] all of the money had been spent, is that correct?

A. Oh, I probably can dig up a few dollars, four or five.

Q. Anything wrong with your right knee, Mrs. Zane? A. Yes, it is stiff.

Q. Your right knee is stiff? A. Yes.

Q. And how long has that been stiff?

A. Ever since the amputation?

Q. Do you know, or do you expect to successfully wear an artificial limb with a stiff right knee?

A. Dr. Palmer said it would limber up with use.

Q. Did Dr. Lytton-Smith know that that right knee was stiff, or do you know?

A. I don't know.

Q. You don't know whether he knows that or not? The question was asked you, Mrs. Zane, by Mr. Stahl in his examination in chief as to whether you believed all the statements that this man Cameron made to you and you absolutely relied upon him. You said you did. Do you still say that?

A. Well, yes, I believe what he told me. [117]

Q. Although, you were aware that he was the claim agent for the Pacific Greyhound Lines and was not down there as your attorney, but was down there for the purpose of settling a claim with you, nevertheless, you say that you put implicit faith in everything that this claim agent told you, is that correct?

(Testimony of Zoa H. Zane.)

Mr. Carson: That question is a little bit argumentative.

The Court: Yes, it is a little bit argumentative on that.

Mr. Carson: I'd say it was solely argumentative.

Mr. Baker: I understand you do say that you put faith in whatever his claim agent told you, is that right?

A. Well, regarding the hospital and such as that, I did, yes.

Q. And regarding the extent of your injuries also? A. Yes.

Q. You just took whatever he said as being a hundred percent right?

A. Dr. Blackman would always confirm his statement about my injuries.

Q. You stated you could produce checks [118] showing where all of this money has been spent. Will you do so by tomorrow—would you endeavor to do so by tomorrow, please? A. Yes.

Mr. Baker: With the reservation of further cross examination along that line, I am through.

Re-direct Examination

Mr. Stahl:

Q. Mrs. Zane, in answer to a question by Mr. Baker, I believe he asked you whether you discussed the terms of the release before you signed it. To what did you refer there; to what?

(Testimony of Zoa H. Zane.)

A. He meant the release that Mr. Cameron left me for a few days.

Q. The one he had left with you?

A. Yes.

Q. Did you refer to this paper that has been introduced here—did you refer to Defendant's Exhibit B, this paper, or did you refer to the other one?

A. No, that is not the one that was left with me for several days.

Q. In addition to your expenditures, has your husband—you said something about him working. Has he been in the service since this accident?

A. Yes. [119]

Q. For how long?

A. For about ten or eleven months, I think.

Q. And he supported the family while he was in the service?

A. I got a hundred dollars a month for I and the two children.

Q. And did you spend any of this money which you received from the settlement during that time?

A. Oh, yes.

Q. Do you remember paying a bill to Dr. Stevens in connection with the anesthetic or the operation? A. That was for the anesthetic.

Mr. Stahl: I ask that this be marked for identification.

(The document was marked as Plaintiffs' Exhibit 5 for identification.)

(Testimony of Zoa H. Zane.)

Mr. Stahl: I show you Plaintiffs' Exhibit 5 for identification. Is that the bill that you have referred to just now?

A. That was for the anesthetic.

Mr. Baker: No objection.

Mr. Stahl: I offer this in evidence.

(The document was received as Plaintiffs' Exhibit 5 in evidence.)

PLAINTIFFS' EXHIBIT NO. 5

Robert H. Stevens, M. D.
808 Professional Building
Phoenix, Arizona

Date 10-27-43

Mrs. Jack Zane
1722 W. Tonto
City

Date	For Professional Services Rendered	Amount
	Anesthetic—3 hours	\$50.00
	Surgeon: Dr. Lytton-Smith	

All Charges After 25th of Month Will Appear
on Next Month's Statement

Mr. Stahl: Now, this is Plaintiffs' Exhibit [120] 5, which I will read to the jury.

(Thereupon the document was read to the jury by Mr. Stahl.)

(Testimony of Zoa H. Zane.)

Mr. Stahl: Did you pay that amount to Dr. Stevens?

A. Yes.

Q. Now, is that amount included in the amount we set up in our complaint, where we say, "Doctors' bills, \$200.00"? A. I think so.

Q. That is a part of that?

A. No, no. Dr. Lytton-Smith's bill alone was \$200.00.

Q. So that is in addition to that?

A. Yes, in addition.

Q. Was that included in the hospital bills of \$185.00? A. No.

Q. How about where you have the medical expense of \$300.00?

A. No, it was not in that.

Q. When you left the hospital, how did you get home? A. By ambulance.

Mr. Stahl: I ask that this be marked.

(The document was marked as Plaintiffs' [121] Exhibit 6 for identification.)

Mr. Stahl: I hand you Plaintiffs' Exhibit 6 for identification. What does that represent?

A. That was when I went home from the hospital, I guess. It looks like that day.

Mr. Baker: No objection.

(The document was marked as Plaintiffs' 6 in evidence and read to the jury by Mr. Stahl.)

(Testimony of Zoa H. Zane.)

PLAINTIFFS' EXHIBIT NO. 6

Ambuliner Service

GRIMSHAW MORTUARY

334 West Monroe

Phone 3-5914

No. 4957

Oct—21—1943

Call at Good Samaritan Room 405

Patient Mrs. Zane

To East Tonto

Requested by Hospital

Time 10:30 A. M.

Charges \$7.50 Att. Phil

Paid 10-21-43

Mr. Stahl: You paid that bill, did you?

A. Yes.

Mr. Stahl: I ask that this be marked.

(The document was marked as Plaintiffs' Exhibit 7 for identification.)

Mr. Stahl: When you entered the hospital did you pay the hospital; make a deposit?

A. Yes, \$50.00.

Q. I will hand you Plaintiffs' Exhibit 7 for identification. What is that?

A. I guess that is upon entrance.

(Testimony of Zoa H. Zane.)

Mr. Stahl: That is Plaintiffs' Exhibit Number 7, you have no objection to the admission of it?

Mr. Baker: How is that?

Mr. Stahl: You have no objection to this, do you?

Mr. Baker: Well, I don't want—that is a [122] duplication. She has already testified about one hospital bill.

Mr. Stahl: Is this a part, Mrs. Zane, of the hospital bills for \$185.00 that you said you paid?

A. I don't remember whether it is or not. I would have to look through my checks to see.

Mr. Baker: Well, I recommend you pass that until tomorrow and have a chance to fix up a statement.

Mr. Stahl: Yes, I will. I believe I asked you, did I, Mrs. Zane, about the amount of help at your house that was necessitated by reason of your being unable to get around on account of your hip injury?

A. Yes.

Q. What did you say that amounted to?

A. Around \$700.00. That was up to the time that brief was filed.

Q. Have you had any expenses since then?

A. I have some help all the time.

Q. Is that occasioned by your being unable to get around except on crutches? A. Yes.

Q. Mr. Baker asked you, I believe, in regard to that voucher for fourteen hundred and some dollars, the small voucher in reference to hospital [123] bills—yes, \$1,467.00; that is Defendant's Ex-

(Testimony of Zoa H. Zane.)

hibit D in evidence, this voucher here, Defendant's Exhibit D. I think he asked you something and referred to that amount as to whether that was the amount of the hospital bill. Aside from this itself, do you knew what the amount of the hospital bill was? A. No.

Q. All you knew was the amount stated in this paper? A. That is all.

Mr. Stahl: I believe that is all.

The Court: Anything further?

Mr. Baker: I reserved further examination concerning the money she spent. She is supposed to bring it in tomorrow.

The Court: We will suspend until 10:00 tomorrow morning. Keep in mind the Court's admonition.

(Thereupon a recess was taken 4:40 o'clock P. M. of the same day.) [124]

10 o'clock a. m., May 18th, 1945, all parties as heretofore noted being present, the trial resumed as follows:

The Court: You may proceed.

ZOA H. ZANE

resumed the witness stand and testified as follows:

Re-Cross Examination

Mr. Baker:

Q. Mrs. Zane, on yesterday I inquired of you as to the nature of the expenditures made by you

(Testimony of Zoa H. Zane.)

showing the dissipation of \$14,500.00 paid to you. You stated that you could not say, but that your cancelled checks would show those expenditures?

A. Yes.

Q. Have you produced those cancelled checks?

A. Yes.

Q. May I see them?

A. Yes. (Handing documents to Mr. Baker).

Mr. Baker: To save time, instead of interrogating her on those checks at this time I will go through them during the noon hour and go on to the next matter. Is that all right with you?

Mr. Carlson: Yes.

Mr. Stahl: I don't know whether there are any questions I want to ask Mrs. Zane.

Mr. Baker: I have one or two questions to [125] ask Mrs. Zane, if that is satisfactory about these checks?

Mr. Stahl: Yes.

Mr. Baker: Mrs. Zane, with reference to the \$500.00 that was paid to you on account of the injuries to your child, that also has been expended, has it?

A. That has been put into War Bonds for the child.

Q. So you still have \$500.00 that was paid for the benefit of the child, is that right?

A. I had nothing to do with that.

Q. Who handled that?

A. My husband, Mr. Zane.

Q. Your husband? A. Yes.

(Testimony of Zoa H. Zane.)

Mr. Baker: That is all.

Re-Direct Examination

Mr. Stahl:

Q. In connection with the child, Mrs. Zane, did you pay any doctor or hospital bills in Indio while the child was at the hospital?

A. No, I didn't.

Q. How is that?

A. No, I didn't pay any hospital or doctor [126] bills.

Q. Did you receive a bill for any of that?

A. No, I never saw the bill for that.

Q. I want to ask you, maybe you have already testified to it, but I don't recall. You related a conversation between Mr. Cameron and Dr. Blackman with reference to the settlement of that bill for charges for the hospital and doctors in Indio. Just about when was that?

A. Well, I think it—just a few weeks before I made up my mind that I would take \$15,000.00.

Q. Do you know about what date?

A. No, it was sometime in January—along, maybe around the 20th, something like that.

Q. You may also have testified to this, but prior to this accident on December 11th, 1942, what had been the condition of your health?

A. Well, I was always healthy and was raised on a farm.

Q. Prior to that time you stated you never had any accidents or injuries?

(Testimony of Zoa H. Zane.)

A. No, I had never been ill or I had never been in any accident.

Q. And prior to December 11th, will you state whether or not you had the full use of your limbs and legs? [127] A. Yes, I was healthy.

Q. Did you—even after December 11th, 1942, did you have any accidents at all up until after the time of the operation over here in Phoenix by Dr. Lytton-Smith? A. No, sir—

Mr. Baker: (Interrupting) Just a minute. May I have that question?

(The question was read by the reporter.)

Mr. Stahl: And after December 11th, did you have any injuries of any kind that you know of?

A. No, sir.

Q. I mean, any injuries occurred to you that you know of after December 11th and after the operation by Dr. Lytton-Smith here in Phoenix, which you state was along in August or September, 1943? A. No.

Q. Were you injured in any way that you know of? A. No, sir; I was not.

Q. Now, during the time you were in the hospital over there up until the time of the settlement, will you state whether or not you discussed the matters with your husband, Mrs. Zane?

A. Yes, we discussed them. [128]

Q. Will you state whether or not you told him of the statements that had been made to you by the agent—the claim agent and this doctor with reference to the extent of your injuries?

(Testimony of Zoa H. Zane.)

A. Yes, sir; I told him what the doctor and Mr. Cameron told me.

Q. What they told you about the artificial limb?

A. Yes, sir.

Q. Now, Mrs. Zane, at the time of this accident did you have any—did you or husband have any money or property of any kind? A. No, sir.

Q. And did you have any since that time except other than the earnings? A. No, sir.

Q. So the money received from the accident was the only money or property you had?

A. Aside from my—

Mr. Baker: (Interrupting) Just a minute, we object to that as definitely leading and suggestive.

Mr. Stahl: I admit it. Will you state what other property, if any, or money you and your husband, or either of you had?

A. None, aside from his income. [129]

Mr. Stahl: I believe that is all.

Re-Cross Examination

Mr. Baker:

Q. Your husband's income was the same after this accident as it had been before, substantially?

A. Yes, except while he was in the Navy.

Q. Well then, you got compensation to the extent of \$100.00 a month, did you not, while he was in the Navy? A. Yes.

Q. By the way, when was he in the Navy, between what dates?

(Testimony of Zoa H. Zane.)

A. From March of 1944, until February of this year.

Q. Mr. Stahl inquired of you concerning some conversation at the hospital that you overheard. What conversation do you refer to when you answered his question?

A. It was between Mr. Cameron and Dr. Blackman.

Q. That is the one where you testified they were in dispute as to the amount of the hospital bill?

A. Yes.

Q. Will you state when you heard that [130] conversation; when was that conversation?

A. I said it was probably around the 20th of January.

Q. Was it after the time that you sent your telegram saying you would accept \$15,000.00?

A. No.

Q. Was it before that time?

A. Yes, it was before.

Q. How long before?

A. Oh, I don't know; possibly a week or ten days.

Q. Did you then know that the sum of \$15,000.00 in settlement then had been offered to you?

A. I beg your pardon?

Q. Had the settlement in the sum of \$15,000.00 been offered to you when you overheard this conversation between Mr. Cameron and Dr. Blackman?

A. No.

Q. It had not? A. No.

Q. At that time—I am referring now to the

(Testimony of Zoa H. Zane.)

time of this conversation that you overheard, were you then insisting that the Greyhound Lines pay your medical bills at the hospital?

A. Was I insisting on their paying it? [131]

Q. Yes.

A. They had always told me that they were going to pay it.

Mr. Baker: That is all.

Mr. Stahl: That is all.

(The witness was excused.)

Mr. Carson: Jack Zane.

Mr. Stahl: If the Court please, very likely we will have to take this witness off for Dr. Lytton-Smith, who is to be here at 10:30.

Mr. Baker: All right.

JACK ZANE

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Carson:

Q. What is your name, please?

A. Jack Zane.

Q. Where do you live, Mr. Zane?

A. 1722 West Tonto.

Q. You are the husband of Zoa Zane?

A. Right.

Q. Prior to December 11th, 1942, did you know

(Testimony of Jack Zane.)

the physical condition of your wife, Jack, in general? [132] A. Yes.

Q. What was that condition?

A. Well, she was in good health.

Q. Had she ever had any injuries that you know of afterwards? A. No.

Q. When was the first time you heard, Jack, about your wife's accident in California? Will you just tell the Court and jury here when you heard about that; what happened; tell it in your own way?

A. Well, that was about six days after the wreck.

Q. How did it come to be relayed to you?

A. By telegram.

Q. Well, did you get a telegram, or where did you live at that time; where were you?

A. I was working at Yuma and I was living at a hotel. I can't call the name of the hotel.

Q. Do you know why the telegram was delayed?

A. Well, in some way I would move two or three times. We only stayed a couple of days in the hotel at that time.

Q. Then what happened; what did you do after you got the telegram?

A. I got on the bus and left that night. [133]

Q. Now, just tell the Court and jury what happened from the time you landed in Indio, if you remember.

A. Well, I think it was Friday morning that I got into Indio.

(Testimony of Jack Zane.)

Q. Was that after—

A. (Interrupting) After the telegram.

Q. Friday morning, that was—you don't know how many days after the accident?

A. Well, it had been seven days. She was taken to the hospital on Friday. I was there the following Friday.

Q. Now, then, what happened?

A. Well, I didn't get to see her until about 10 o'clock that morning, and I think it was about two weeks before I got to see Dr. Blackman.

Q. Did you meet a gentleman by the name of Mr. Cameron? A. I did.

Q. When was that, if you remember?

A. That was two or three days after that, and as well as I can recall it was on a Sunday.

Q. Just tell where it was and what was said and what took place?

A. Well, I met him in my wife's room and I was introduced in there and we didn't have much [134] conversation in there, and then he went out to the car. It was parked in front of the hospital.

Q. Did he give you his card?

A. I don't remember.

Q. What took place; what was said?

A. Well, we had quite a long talk over the condition Mrs. Zane was in at the time she was at the hospital, and I brought up about I thought she should be moved to Los Angeles, I didn't think they had the facilities in a small hospital there for that kind of a case and I knew lesser cases have been

(Testimony of Jack Zane.)

moved to Los Angeles prior to this time, and he assured me that she didn't need to be moved, that Dr. Blackman was one of the best doctors and just as good a doctor in or out of Los Angeles; he had taken care of other cases for the company and employees running in and out of Indio.

Q. Do you remember of any conversation that you had with him as to whether or not he was their doctor, or what did he say in that regard?

Mr. Baker: Just a minute. If the Court please, this leading and suggestive, and furthermore it has already been answered.

Mr. Carson: Well, it has not been answered, Your Honor. I don't think it is leading and suggestive. I think the question is competent. [135]

The Court: Well, he just answered it, didn't he?

Mr. Carson: Well, repeat that conversation again.

The Court: Oh, it is not necessary. I can't take up the jury's time with that.

Mr. Carson: I see, okay. Was there anything else said at the time, Jack?

A. No, I can't remember all of it. It has been quite a while back.

Q. Did he say anything about the condition of your wife? A. Yes.

Mr. Baker: We object to that upon the ground it has been answered already.

The Court: Oh, he may answer.

Mr. Carson: What did he say?

A. Well, he said the condition she were in when

(Testimony of Jack Zane.)

she were out at the hospital, they thought for a while they were going to lose her.

Q. Do you remember any further conversation with Mr. Cameron? Do you remember a conversation—any conversation you had—what he did on the day that the case was settled, Jack?

Mr. Baker: Would you give me that?

(The question was read by the reporter.) [136]

Mr. Baker: I think I will object to that on the ground it is unintelligible.

Mr. Carson: That is probably true. Did you hear any conversation on the day the case was settled, what Mr. Cameron said or done? Just tell in your own way, Jack.

A. Well, he was in the room there at the time of this release.

Q. Just describe what took place.

A. All right. Well, he thought it was a good settlement we were getting. He stated to the wife and myself that there was nothing more than what was to be done at that time wrong with her and that she could wear an artificial leg the same as Dr. Blackman stated.

Q. How long was he there?

A. Oh, I don't know; I couldn't swear to that.

Q. Did he storm a little bit around there that day? A. He did.

Q. What did he say; what was his attitude?

A. Well, he was tired fooling with that case and in lots of ways he was pretty nasty about it.

(Testimony of Jack Zane.)

Q. What did he say about it in regard to that; repeat the conversation, if you can, Jack? [137]

A. He would get in trouble with the home office. He spent all the time he was going to spend on that case.

Q. Was Zoa crying that day? A. She was.

Q. Were you in Indio all the time, Jack?

A. No.

Q. Where were you; what were you doing?

A. Las Vegas, Nevada.

Q. What were you doing?

A. Working for the electric company.

Q. War work? A. Yes.

Q. How much time did you spend in Indio?

A. I don't know. I was in and out of Indio and Las Vegas working for the same company on two jobs.

Q. Did you ever talk to Dr. Blackman?

Mr. Baker: Just a minute; what was that question?

(The question was read by the reporter.)

Mr. Baker: Answer that yes or no.

A. Yes.

Mr. Carson: Do you remember on what occasions, Jack, if you can?

A. Well, the first time I talked to him was [138] just about the wife's condition.

Q. What did he say? A. Well—

Mr. Baker: (Interrupting) Just a minute. We object to that, if the Court please, on the ground

(Testimony of Jack Zane.)

that as far as this Defendant is concerned it is purely hearsay.

The Court: He may answer.

A. Well, just the condition she was in; she was getting along better; they had done all they could.

Mr. Carson: Did he ever assure you that she would be able to wear an artificial limb?

Mr. Baker: Just a minute. Object on the ground it is leading and suggestive.

The Court: Yes.

Mr. Carson: What did he say in regard to—what did Dr. Blackman say in regard to the use of an artificial limb, if he said anything?

Mr. Baker: We object to that on the ground it is hearsay as far as the Defendant is concerned.

The Court: All right. He may answer.

Mr. Carson: Do you remember what he said, Jack?

A. Well, he said she would be able to use an artificial limb; there was no other injuries. [139]

Q. No other injuries. Did you discuss this matter with your wife about what he had said?

A. Yes, we did.

Q. Did she discuss with you what the claim agent and the doctor told her—told you—told her.

Mr. Baker: Just a minute. We object to that on the ground it is wholly hearsay, a conversation between two plaintiffs.

The Court: Yes.

Mr. Carson: While you were at Las Vegas did you make an appointment with Mr. Cameron, and

(Testimony of Jack Zane.)

could you get down there? You can relate what happened about that, Jack.

A. No, I didn't make no appointments with him.

Q. Well, did he seem angry because you could not get back there sometime to sign the papers?

A. Yes.

Mr. Baker: Just a minute. He asks the question and gives the answer to the witness.

Mr. Carson: Well, Jack, do you remember where that release was that day, or a release—do you remember of Zoa having possession of a release before Mr. Cameron came back; was it in the room, or do you remember? [140]

A. Yes, the release was in the room. What place it was in the room I don't know.

Q. Can you relate what happened when that release was signed or a release was signed; What happened?

Mr. Baker: That has been asked and answered once, if the Court please.

The Court: I don't know. This examination is a little confusing to me. I can't follow it.

Mr. Carson: Well, that is proper. Jack, state whether or not you believed the statements that Mr. Cameron and Dr. Blackman made to you concerning her condition?

A. Yes, I believed them.

Q. Did you rely on them?

A. Certainly.

Q. Would you have signed that release if it had not been for those representations? A. No.

(Testimony of Jack Zane.)

Q. If you had known that—state whether or not if you had known that she had this hip fracture you would have signed the release?

Mr. Baker: Just a minute, that is assuming a fact that she did have a fractured hip at that time.

The Witness: Yes. [141]

Mr. Carson: If you had known that she did have a hip fracture, would you have signed the release?

A. Why, no.

Q. Can you state what you thought the extent of the injuries were at the time of signing the release, if you know?

Mr. Baker: Just a minute. What was that question?

(The question was read by the reporter.)

Mr. Baker: Well, we object to what he thought, if the Court please. She testified and the testimony is in here what her condition was.

Mr. Carson: I think he can answer the question.

The Court: No. He has answered that several times.

Mr. Carson: Well, if he has, that is all.

Mr. Baker: Dr. Lytton-Smith is here if you care to put him on.

Mr. Carson: All right.

(The witness was temporarily excused.)

DR. JAMES LYTTON-SMITH

resumed the witness stand for further examination, and having been heretofore duly sworn, testified further as follows: [142]

Direct Examination Resumed

Mr. Carson:

Q. Dr. Lytton-Smith, you have some X-rays there, do you? A. Yes.

Q. When were they taken, do you know?

A. I had some taken on October 4th, 1943; some on October 12th, 1943; October 13th, 1943; October 20th, 1943; January 31st, 1944; November 17th, 1943; December 20th, 1943.

Q. Where were they taken, do you know, Doctor?

A. I believe all of these were taken at the Good Samaritan Hospital.

Q. That is, pictures of Zoa Zane?

A. Yes.

Q. Can you state how they come to be taken; what was the reason for their taking, Doctor?

A. The X-rays were taken, as I recall it, before and during the course and following surgery.

Q. That is, the surgery that you performed at the Good Samaritan? A. Yes.

Q. Would you tell the Court and jury the circumstances; what took place?

Mr. Baker: Just a minute. First, he had better identify these. [143]

Mr. Carson: Well, will you hand these—the ones that were taken, Doctor—

The Witness: Do what, now?

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: The X-rays that were taken, can you identify that were taken, the ones you used?

A. I can identify the ones I saw taken.

Q. They were all taken at the Good Samaritan Hospital?

A. They were all taken at my order.

Q. And taken at the Good Samaritan Hospital?

A. Yes.

Q. Get those out, all of them, the ones you saw taken and the ones taken at your order.

A. Now, certain ones I saw taken, was present when they were taken.

Mr. Baker: Mr. Carson, insofar as that is concerned, I am not requiring the technician that took those. I want you to identify that they were taken at a recognized place at his instructions, that is all; that is sufficient.

Mr. Carson: All of these X-rays that you have or used were taken at the Good Samaritan Hospital at your request?

A. Yes.

Q. Will you separate those, Doctor, that were? [144]

A. These are the ones that were taken while I was present. These X-rays—

Mr. Carson (Interrupting): Let me have that—

The Witness (Continuing): —which is dated October 31st.

Mr. Carson: Can this be admitted in evidence, Mr. Baker?

Mr. Baker: I would like to look at it first.

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: Okay. (Handing the instrument to Mr. Baker.)

Mr. Baker: I'd like to ask one question.

The Witness: I beg pardon. I say, October 31st or October 13th?

Mr. Baker: October 13th, 1943, it is marked.

The Witness: That is correct.

Mr. Baker: That was after you performed the operation?

A. That was during the operation.

Q. That shows your bone graft, does it?

A. No. That has got a pin and the drill which was being introduced to make a place for the bone graft to be admitted.

Q. That was during the operation?

A. That was during the operation.

Q. So that dark spot in there is the drill [145] and not the grafted bone, is that correct?

A. That is correct, yes.

Mr. Baker: I have no objection.

Mr. Carson: I offer it in evidence.

(The document was marked as Plaintiffs' Exhibit 8 in evidence.)

Mr. Carson: He stated they were all taken in his presence.

The Witness: This one was taken before surgery. This one was taken following surgery with the bone graft in place.

Mr. Baker: I might say, to save time, I might ask the doctor how many of those are necessary?

Mr. Carson: How many of those are necessary?

(Testimony of Dr. James Lytton-Smith.)

A. I am just giving you the ones that were necessary. This shows the radiograph which was taken January, 1943, when the bone graft had absorbed and broken. I think the others are unnecessary.

Mr. Carson: May they all be admitted in evidence, Mr. Baker?

Mr. Baker: Four of them?

Mr. Carson: Yes.

Mr. Baker: I'd like to interrogate him with a couple of questions. So the record may show [146] what we are talking about, let me see if I can identify these. There is one, according to the tag attached to the photograph, that was taken on October 4th, 1943, and bears the Good Samaritan Hospital number 15036. That X-ray photograph was taken when, with reference to the operation performed on Mrs. Zane?

A. October 4th, 1943? That was before surgery.

Mr. Baker: We have no objection to that. I think you so testified.

(Thereupon the document was received as Plaintiffs' Exhibit 9 in evidence.)

Mr. Baker: I have another photograph which indicates that it was taken on October 13th, 1943, and bears the Good Samaritan Hospital number 15118. That, I believe, you testified, was taken during the operation? A. Yes.

Q. And the portion shown in black you say is the drill? A. That is the drill.

Mr. Baker: We have no objection to that.

(Testimony of Dr. James Lytton-Smith.)

(The document was received as Plaintiffs' Exhibit 8 in evidence.)

Mr. Baker: I have another photograph, which, [147] according to the record on the photograph, was taken October 20th, 1943, and bears the Good Samaritan Hospital's number 15162. That was taken after the operation?

A. Yes.

Q. And shows the bone graft, does it?

A. Yes.

Mr. Baker: Our objection to this offer is that it was taken after the operation had been performed and, (therefore, we would consider it as irrelevant, incompetent and immaterial.

The Court: It may be received.

(The document was received as Plaintiffs' Exhibit 10 in evidence.)

Mr. Baker: I have another photograph purporting to have been taken on January 31, 1944, bearing the Good Samaritan Hospital's number 16082. Was she still under your treatment at that time? A. Yes.

Q. Was she still in the hospital?

A. She had been discharged from the hospital and I think she was brought back into the hospital for that picture.

Mr. Baker: Our objection to this offer is the same as to the previous offer.

The Court: It may be received. [148]

(The document was received as Plaintiffs' Exhibit 11 in evidence.)

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: Mr Baker, will you stipulate that this is probably true?

Mr. Baker: I don't know.

Mr. Carson: Dr. Lytton-Smith, this plate here or chart, would you say that that represented a true picture of a person's leg?

A. Well, that is another skeleton.

Q. Another skeleton, but from here on down, that is the hip?

A. That is fairly true, yes.

Q. Will you describe to the jury, Doctor, the nature of the bone that fits—that is, the femur that fits into this place right here where this injury is that you operated. A. Yes.

The Court: He did that yesterday, didn't he?

Mr. Carson: Well, I don't know. I think, your Honor, the jury should have a picture of this whole thing.

The Court: Well, he drew a picture once, why do it again?

Mr. Carson: All right.

The Court: Wasn't that what you did yesterday?

A. Yes, sir. [149]

Mr. Carson: Now, can you interpret those X-rays, Doctor, that you have there?

A. Yes.

Q. Will you do that?

Mr. Baker: Will you, Doctor, in doing so, please indicate it by the exhibit number. Maybe the Clerk can help us so we may have a record of those things.

(Testimony of Dr. James Lytton-Smith.)

The Clerk: So you can identify the numbers, Doctor, they are in ink.

The Witness: X-ray Number 15036, Exhibit 9, shows that the neck of the femur has been broken, and that there, in my opinion, has been some absorption of the head; that is, of the neck of the femur, and that there is no evidence at this time of a union being present.

Exhibit Number 8 shows a reduction has been made, bringing the fragments into contact, and that a guide pin of the Brandberry type has been introduced, and that a drill of the Albee type is being introduced through the neck and into the head of the femur.

Exhibit marked Number 10 shows that the fragments are in contact, reduction has taken place and that the bone graft has been introduced which passes beneath the trochanter and through the neck [150] of the femur and into the head of the femur.

Exhibit Number 11 shows that there has apparently been absorption of the graft and that the graft is broken and that the shaft of the femur is riding upward with displacement.

Mr. Carson: Doctor, can you tell from the X-rays and from your knowledge of the case that you learned by observation, and as to what caused the injury to the femur that you operated on?

Mr. Baker: Now, I want to ask if you understood that question or not?

A. No, I don't know.

Mr. Carson: At the time it occurred.

(Testimony of Dr. James Lytton-Smith.)

The Witness: As to the time?

Mr. Carson: Yes.

A. I feel that it had happened quite a few months before the time that I first saw her. That is as definite as I can be.

Q. Doctor, assuming that the Plaintiff, Zoa H. Zane, prior to her injury on December 11th, 1942, was 23 years of age, a strong, healthy, robust girl, a mother of two children, able to do heavy physical work; had not in all her lifetime had any serious illness or accident so far as is known, no accidents that caused any fractures, and that at the time of the accident when a bus on [151] which she was riding ran in the rear of a truck smashing a part of the bus, throwing her violently from the bus to the ground, from which she suffered severe fractures and smashed her bones below the right knee making amputation necessary which confined her in the hospital in Indio, California, for approximately three months, suffered severe pain in her right leg after this amputation; and prior to the accident having the full use of her right leg, and in the early part of March, 1943, she was measured for an artificial limb by an agent of any artificial limb company in the city of Los Angeles, the result of the measurement showing that the upper part of her right leg was $2\frac{1}{2}$ inches shorter than the left leg; that she was unable to leave the hospital and wear an artificial limb; that a later operation was performed at the hospital in Indio, California, by Dr. Blackman to try to make it possible for her

(Testimony of Dr. James Lytton-Smith.)

to wear an artificial limb, and ever since leaving the hospital she has been in continuous pain; that in September or October of 1943, X-rays were taken showing a fracture where it was connected with the pelvis. In your examination you found that the X-ray pictures show an old fracture, and she suffered no falls or injuries between the time of the bus accident and the time [152] the X-rays were taken in September of 1943. Do you have an opinion, based upon your personal examination and your examination of the X-rays and the history of the case as I have given it to you, as to what was the cause of the fracture of the hip of Zoa H. Zane, if you have that opinion?

Mr. Baker: Just a minute. I object on the ground that it calls for a conclusion of the witness by way of a hypothetical question; the hypothetical question does not recite all the facts proven in the case and fails to state other facts which have been proven and which are pertinent to the answer called for by the question.

The Court: Well, that is a general objection. Now, you just state specifically what you have in mind.

Mr. Baker: It does not describe the treatment administered to the patient while she was in the Indio hospital; does not describe the operations which were performed on her and the purpose for such operations while she was in the Indio hospital. It fails to state the nature of the pains that she suffered; fails to state the treatment that was ad-

(Testimony of Dr. James Lytton-Smith.)

ministered to her by the nurses and others while she was at this hospital, and it assumes facts which have not been proven in the case [153] in that it assumes that her leg was $2\frac{1}{2}$ inches shorter while she was in the Indio hospital. Well, there is no proof of that—

Mr. Carson (Interrupting): Just a minute, Mr. Baker—

The Court (Interrupting): Just a minute. Let him finish.

Mr. Carson: Okay.

Mr. Baker: It states other facts which are not in accordance with the testimony; that is, competent testimony that has been introduced in the case, in that it recites matters as facts which are proven by hearsay.

Mr. Carson: Your Honor, on the question of being $2\frac{1}{2}$ inches shorter, I want the Court Reporter—now, if you remember that yesterday she testified, without objection—that was the first witness—on the part of Mr. Baker, that an agent came in from Los Angeles, measured her for an artificial limb, and that it was $2\frac{1}{2}$ inches shorter and she reported that to Dr. Blackman. Now, that was testified and without objection. The second one was objected to, and it has been—but there was no objection to that testimony and it went into the records.

Mr. Baker: Well, that is purely hearsay. [154]

The Court: Which leg was $2\frac{1}{2}$ inches shorter?

Mr. Carson: That the upper part of the right

(Testimony of Dr. James Lytton-Smith.)

leg was $2\frac{1}{2}$ inches shorter than the upper part of the left leg.

Mr. Baker: She testified that some fellow that made the artificial limbs told her that.

Mr. Carson: Measured it. That went into the record and was not objected to. If there is any doubt about it let the Court Reporter refer to his notes.

The Court: Well, perhaps the doctor could testify to it in his examination. I don't know.

Mr. Carson: All right.

Mr. Baker: He can't testify to what existed at the time in Indio. You would not undertake to do so, would you, Doctor?

A. No.

The Court: Oh, well, go ahead and answer the question.

Mr. Carson: Go ahead and answer the question, Doctor Lytton-Smith.

The Witness: Now, the first question or the second question?

The Court: The hypothetical question.

A. The hypothetical question. I will say it was my opinion that her hip was fractured as a [155] result of the bus accident.

Mr. Carson: Doctor, did you ever measure her hip, the upper and right part of the—the right leg, or the upper part of her right leg and the left leg?

A. I don't recall. I do have, as stated in my notes, that there is a definite telescopic present which means the bone sliding up past the hip-joint,

(Testimony of Dr. James Lytton-Smith.)
and that was on my initial examination on September 27th, 1943.

Q. What do you mean by that, Doctor, riding up and down? Can you tell? Just explain.

A. Well, if this is broken and it just pushes it up, just slides the bone.

Q. This socket where it used to fit, is that right?

A. Yes.

Q. The X-rays that you showed to the jury reveal a fracture of this femur here, the femur bone attached to the hip on the right?

A. Revealed a fracture of the neck of the right femur.

Q. In any case, where there is an X-ray taken of that one—

A. (Interrupting): I beg your pardon?

Q. Would an X-ray picture taken of that condition [157] at any time reveal the fracture that exists there?

A. Well, that goes into the theoretical interpretation of X-rays. You mean, does it always show?

Q. Well, does it show in this particular case?

A. It shows a fracture of the neck of the femur in this particular case.

Q. Now, what is the effect, Doctor, of this fracture of her wearing an artificial limb; that is, jolting up and down?

Mr. Baker: We object to that. That has been asked and answered I don't know how many times.

The Court: This witness answered it.

(Testimony of Dr. James Lytton-Smith.)

Mr. Carson: All right, Doctor, in a fracture of a bone of this nature, the hip, what kind of a blow or trauma would it take to make such a fracture?

A. This is a fracture of old age primarily. It usually occurs in people over 70 years of age, at which time we believe the fracture is a result of a twist and then the patient falls, rather than the fall causing the fracture. It is relatively an infrequent fracture in a young individual. The only patients I have ever treated with a fracture of the neck of the femur under 40 years [157] of age have been the result of very severe violence, such as being thrown off of a horse, or a horse rearing over backwards, or falling off of a building, such injuries as that.

Q. Doctor, I think you testified yesterday, if I am not sure, and it was not quite clear to me, but state whether or not she will ever be able to wear an artificial leg.

Mr. Baker: If the Court please, I certainly object to that. It has been asked and answered.

The Court: You may answer.

A. I don't think she could.

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(Thereupon a short recess was taken.)

After recess, all parties being present as noted by the Clerk's records, the trial resumed as follows:

Dr. James Lytton-Smith resumed the witness stand and testified further as follows:

(Testimony of Dr. James Lytton-Smith.)

Direct Examination Resumed

Mr. Carson:

Q. Doctor, will you state whether or not, from your physical findings observed by you and [158] the history of the case given by the patient and the X-rays are consistent with the history given as of the accident as of—the injury having occurred on December 11th, 1942—

Mr. Baker (Interrupting): Wait just a minute, Doctor. Will you read that question?

(The question was read by the Reporter.)

Mr. Baker: It is unintelligible to me. Can you understand that, Doctor?

The Witness: I think I can—I know what he means.

Mr. Baker: I am sure I don't know. I will object to that and ask that it be re-framed.

Mr. Carson: All right, all right. State whether or not the physical findings observed by you and the findings of the X-rays are consistent with the history of the injury as of December 11th, 1942.

Mr. Baker: I object to that, if the Court please. I don't understand exactly the purpose of it. He speaks about the history, the date.

The Court: "Are consistent with the history"?"
tory"?

Mr. Carson: Are consistent, the injury having occurred—

(Testimony of Dr. James Lytton-Smith.)

Mr. Baker: Well, that has been answered already. [159]

The Court: Yes, I don't believe we will waste any more time.

Mr. Carson: All right, okay. That is all.

Cross Examination

Mr. Baker:

Q. You identified the first one, I believe, that you testified to, as Number 9. A. Yes, sir.

Q. Plaintiffs' Exhibit Number 9 is a photograph that was taken on October 4th, 1943 is that correct? A. Yes.

Q. That was before the time that you performed the operation that you have described, is that correct, Doctor? A. Yes.

Q. Now, you said from this photograph you determined that at the time the photograph was taken on October 4th, 1943, there was a fracture in the femur?

A. I beg your pardon. Do you mean that I determined that from this picture?

Q. Yes. A. Yes.

Q. From the picture? A. Yes. [160]

Q. And will you, with your finger, indicate the line of fracture?

A. Right in through here (indicating).

Q. That is vertical?

A. We call it transverse.

Q. I mean, insofar as the picture is concerned, it is vertical? A. Yes.

(Testimony of Dr. James Lytton-Smith.)

Q. This indicates the fracture right in through here (indicating)? A. Yes.

Q. Now, you said from this picture you could determine that the fracture was not recent, is that true? A. That was my opinion, yes.

Q. And from what did you determine that; that is, what does the picture indicate where you arrived at the result that the fracture was not recent?

A. The X-ray determination of the exact length of time since the fracture, of course, is not possible.

Q. That is what I thought, Doctor.

A. But my interpretation of this being old was based upon the fact that the margins of the fracture are smooth, rounded, no sharp spicules [161] present as you usually see in a fracture, and, furthermore, that the head is slightly more dense than would be expected in a femoral head which is fractured.

Q. In other words, that is all you can determine, was that it was what you physicians call an old fracture and not a recent one?

A. That is correct.

Q. You could not decide whether it occurred two months or two years before that time, could you, before the time the picture was taken?

A. I would say that more than likely more than two months, but I could not say whether it was six months or two years.

Q. You couldn't say whether that fracture occurred six months before that, before the picture was taken, or whether it occurred two years before?

(Testimony of Dr. James Lytton-Smith.)

A. That is correct.

Q. That is correct, isn't it? A. Yes.

Q. And to determine the fact that it was your opinion that the fracture occurred at the same time of this accident in December of 1942, you would have to rely upon the history that the Plaintiff gave you, didn't you? A. Yes. [162]

Q. You can't determine that from the photographs? A. No.

Q. Definitely not. Now, you referred to—this last one which you identified in your direct examination, I believe it was 10 or maybe 11. Eleven, I believe. I believe in testifying as to your findings from this picture, which is Plaintiffs' Exhibit Number 11 in evidence, you stated that that showed the bone graft that you had placed in the hip. It does show the bone graft?

A. It shows what is left of it.

Q. Now, you say that the bone graft that you placed there is fractured? A. Yes.

Q. Can you state what caused that fracture?

A. I think it was from re-absorption.

Q. You say, you think?

A. No, I am not sure what caused the fracture.

Q. You are not sure what caused the fracture? A fall could have caused it, couldn't it?

A. Possibly.

Q. This picture that you are referring to was taken on January 31st, 1944? A. Yes.

Q. Some months after you had performed

(Testimony of Dr. James Lytton-Smith.)
this [163] bone graft operation, is that true, Doctor? A. Yes.

Q. And the fracture that is indicated in that picture which you say, does show a fracture, is that right? A. It shows a fracture, yes.

Q. And that fracture occurred after the time of your operation, didn't it? A. Yes.

Q. And as you stated, that fracture could well have been caused by a fall?

A. Yes, it could have been.

Q. Now, Doctor, at the time that you examined Mrs. Zane—first, please state the date that you made your first examination of Mrs. Zane.

A. My record shows that I examined her first on September 27th, 1943.

Q. September 27th, 1943? A. Yes.

Q. You had never seen her before that?

A. No.

Q. And I believe you stated that the occasion for your examination at that time was that she was sent to you by Dr. Ryerson?

A. Referred to me by Dr. Ryerson, yes.

Q. And did Dr. Ryerson give you a history of [164] the case?

A. As I recall, he called me on the 'phone and told me that this patient had a fractured hip and he wanted me to take charge of the treatment.

Q. Did Dr. Ryerson tell you when he first had examined Mrs. Zane for this fractured hip?

A. I don't remember that point?

Q. You don't recall? A. No.

(Testimony of Dr. James Lytton-Smith.)

Q. As to whether he gave you the history of when he first examined her, you don't know?

A. I would not be certain on that point.

Q. Now, on September 27th, 1943, when you made your first examination, you took no X-rays at that time?

A. No, I had the X-rays which had been taken by Dr. Ryerson.

Q. You had some X-rays that had been taken by him. Now, forgetting those X-rays, which are not here, recite what examination you made of Mrs. Zane at that time.

A. Shall I read from my record?

Q. I am not so particular about the result of your examination, Doctor. What I wish to know is the nature of the examination you made; in other words, what did you do; did you manipulate her [165] limbs? A. Yes.

Q. That is what I am after.

A. I noted there was an amputation of the right leg below the knee at the so-called site of the election and there appeared to be a moderate amount of genu valgum, knock-knee to the right knee. There was some thickening of the synovia, which is along the knee joint, and there was limitation of extension of the stump; that is, the knee would not completely extend. I noted that the stump was still healed and appeared to be in good condition for application of a prosthesis. I felt a definite crepitus or grating or grinding in the region of the

(Testimony of Dr. James Lytton-Smith.)

right hip, and I noticed that the hip slid up and down, where it should be stationary.

Q. All right. Now, what physical act do you perform to determine this action in a hip that you have described?

A. You put the patient on a table flat on their back and you catch hold of the leg, and I frequently will have the assistant or the nurse do that while I feel over the hip joint, and you can feel when they pull back and forth, you can feel the grinding and grating going on there.

Q. Therefore, it would take no X-ray to [166] determine the fact that there was a fracture of that hip, would there? A. No.

Q. You could determine it by a very simple manipulation of the leg, that is true, isn't it?

A. Yes.

Q. In other words, that was discernible from what you might call just a superficial examination of the bone?

A. That is true. Of course, I had the advantage of having seen the X-rays before and I knew what to look for.

Q. Well, if you didn't have the X-rays, you would determine and come to the same result, wouldn't you? A. I think I would.

Q. Naturally, you would arrive at the same result, that is a fact? A. I think so.

Q. What did you say was wrong with the right knee?

A. There is what we call a flection fracture. In

(Testimony of Dr. James Lytton-Smith.)

other words, after the amputation of an extremity a flexion may develop in the knee. Now, the hamstring muscles are stronger in back of the knee than the quadriceps muscles, so that the [167] knee tends to pull down and leaves the leg flexed. The quadriceps muscles not being as strong as the hamstring muscles, the knee cannot be fully extended.

Q. So as I understand it from your examination, you are of the opinion that whatever trouble she may have with the right knee was muscular and not bone, is that correct?

A. With the knee, yes.

Q. That is what I am talking about, the knee.

A. Yes.

Q. There were no indications of fractures of the knee at that time?

A. I don't recall having noted any fractures in the knee.

Q. Did you see any X-rays of the knee at that time that you made your examination?

A. I don't believe that I did.

Q. In other words, Dr. Ryerson had made no X-rays of the knee? A. No.

Q. And neither did you? A. No.

Q. The reason for that was, Doctor, you didn't deem it necessary, is that right?

A. That is true. [168]

Q. From your manipulation of the knee and your superficial examination that you made, you came to the conclusion that there was no fracture

(Testimony of Dr. James Lytton-Smith.)
of that knee, and whatever impediment existed was solely muscular, that is true, isn't it?

A. That is correct.

Q. In other words, Doctor, you don't X-ray every part of the body before you undertake to repair an injury, do you? A. No.

Q. You only X-ray that portion of the body which you believe has been damaged or injured, that is true, isn't it? A. Yes.

Q. And for that reason you didn't have any X-ray made of this lady's right knee?

A. There was no complaint from the knee.

Q. No complaint from the knee. Now, was that knee in such a condition at that time that she could have well worn an artificial limb, assuming there was no damage to the hip?

A. I think she could, yes.

Q. In other words, the impediment in the movement of the knee would not impede her use of an artificial limb?

A. It would have been slightly more difficult [169] than if she could have extended fully the knee, but I think she could have easily worn an artificial extremity.

Q. Doctor, have you examined this lady's knee since October, 1943?

A. Yes—wait a minute, I beg your pardon.

Q. Have you examined her right knee since October, 1943?

A. You mean, as to the extension of flexion, and so forth?

(Testimony of Dr. James Lytton-Smith.)

Q. Yes.

A. The last time I examined the patient was on October 30th, 1944. I examined the knee. I have a notation in my file on the examination of the knee on January 17th, 1944.

Q. On January 17th, 1944, and that examination again was without the use of X-rays, is that true?

A. That is correct.

Q. Of the knee, and what did you determine then to be the condition of her right knee?

A. She had flexion contraction then of approximately 20°, and she only had about 40 to 50 degrees motion in the knee.

Q. Was that any different than it was in October, 1943, when you made—September, 1943, when you made your first examination? [170]

A. I am not certain on that point.

Q. Well, from your examination made in January of 1944, that was the date that you recited?

A. January 17th.

Q. 1944? A. Yes.

Q. Would you say then at that time that she had a fracture of the knee?

A. As I recall, she had a history of having had an old fracture in the knee.

Q. Had an old fracture?

A. Of having had an old fracture in the knee.

Q. How old, do you know?

A. I think that she had one at the time of the accident.

Q. At the time of the accident?

(Testimony of Dr. James Lytton-Smith.)

A. That was my understanding. I may be incorrect on that.

Mr. Baker: Mark those for identification, please.

(Thereupon the documents were marked as Defendant's Exhibits F, G, H, I and J for identification.)

Mr. Baker: Handing you Defendant's Exhibit G for identification, which is an X-ray photograph, [171] now, and I assume that was taken on the fifth day of April, 1945. Is that a photograph of the knee? A. Yes.

Q. Does that show a fracture?

A. It shows an old fracture. It shows an old fracture, in my opinion.

Q. How old?

A. I'd want more views than this to base my opinion on.

Q. Here are some more (handing X-ray photographs to the witness).

A. I'd still want more views.

Q. That is all I have. That is a photograph, isn't it? That is not of the knee?

A. No. There is no direct AP or direct lateral taken of this. I believe there is probably an old fracture of the femur at the head and, perhaps, of the lateral condyle, but I would not be sure from these photographs.

Q. But they do show a fracture?

A. I would not be sure, but I think so.

Q. That fracture may have been two months before the picture taken?

(Testimony of Dr. James Lytton-Smith.)

A. Oh, I won't give an opinion on those X-rays.

Q. The only thing you will state, however, [172] is that they do show there was a fracture of the knee on the date when those X-rays were taken.

A. I think so. I would not be sure on that.

Q. That fracture of the knee could have been caused by a fall, of course? A. Oh, yes.

Q. Well, Doctor, a hypothetical question was asked you which recited many facts which I am not going to undertake to try to recite. Perhaps you know, I don't, and you ventured an opinion based—in answer to that question that the fracture of the femur which now is apparent to Mrs. Zane could have occurred at the time of the bus accident on December 11th, 1942, that is correct, is it not?

A. Yes.

Q. And I believe you already testified that to arrive at that conclusion you must assume as true the history of the case as recited by the patient, Mrs. Zane? A. Yes.

Q. And you have also testified to the fact that this fracture was readily discernible without even the use of the X-ray? A. Yes.

Q. That is true, is it not? A. Yes. [173]

Q. The same would have been true immediately after the accident; that is also a fact, is it not?

A. It probably would have been a little more difficult, due to the fact that an old non-union usually does not cause the amount of pain that a recent fracture does. The muscles can be relaxed

(Testimony of Dr. James Lytton-Smith.)

more and there is less swelling so you can palpitate the field easier later on than you can earlier.

Q. But any examination or manipulation of the leg while Mrs. Zane was in the hospital in Indio would have indicated that fracture, in your opinion, is that right?

A. I think it could have been determined, possibly.

Q. Now assuming, Doctor, that you were the physician in attendance in the hospital in Indio when Mrs. Zane was brought there, and assuming that there was a very apparent severe fracture of the leg below the knee that required immediate amputation in order to save her life, and assuming that you, as a physician, did your manipulation of the knee to determine whether there were other fractures and in your opinion there were no other fractures, would you cause any X-ray of the hip to be taken?

A. I certainly would not take X-rays unless [174] I thought they were necessary.

Q. In other words, unless your physical examination or your superficial examination indicated some injury that required an X-ray, you would not X-ray that part of the body? A. No.

Q. You have not heard all of the testimony in this case, have you, Doctor? A. No.

Q. From the testimony it would appear that Dr. Blackman, in the Coachella Hospital in Indio, California, amputated Mrs. Zane's leg on December 11th, 1943, the same day that the accident occurred,

(Testimony of Dr. James Lytton-Smith.)

the amputation being made below the knee; that she was in the hospital then for a matter of six weeks, being lifted in and out of bed, the leg being moved frequently; that is, her right leg, and six weeks after this amputation another operation was performed upon that right leg solely for the purpose of adjusting and fitting the leg to an artificial limb—what is the technical name, by the way, Doctor, for that type of an operation?

A. Repair a stump.

Q. Repair a stump. Assuming those facts to be true, would you say, in your opinion, that this fracture of the hip existed at that time? [175]

A. It could have and certainly should have been noticed.

Q. You say it would have been noticed, wouldn't it?

Mr. Carson: No, he said it should have.

Mr. Baker: It should have been noticed, certainly, and no physician would perform that second operation to repair the stump if there was any indication of a hip fracture, would he?

Mr. Carson: We object, he is assuming a state of facts not in evidence.

The Court: This witness could not tell what any physician would do.

Mr. Baker: What?

The Court: I say, this witness could not tell what any other doctor would do.

Mr. Baker: All right. You would not, would you, Doctor? Under those state of facts, if you

(Testimony of Dr. James Lytton-Smith.)

were Dr. Blackman, you would not have performed that second operation, would you?

A. Not if I knew the hip was fractured.

Mr. Baker: That is right. I think that is all.

Re-Direct Examination

Mr. Carson: [176]

Q. Doctor, when you have a fracture of the hip, the neck of the femur, does it ever show up in the knee, pain in the knee?

A. Diseases of the hip very frequently refer pain to the knee. Most of the children who come in with tuberculosis of the hip complain of the knee before they complain of the hip. Notoriously, the condition of the hip refers pain in the knee. Usually, with a fractured neck of the femur there is pain in the hip also.

Q. Doctor, assuming that Mr. Zane had her right portion of her leg measured for an artificial limb, and assuming the facts to be that the right portion of her leg above the knee was two inches shorter than the left one. That is reported to the doctor. In your opinion, with those facts reported to you, you would have an X-ray made, a picture of the femur bone that fits into the—here at the top (indicating)?

Mr. Baker: Just a minute. We object to that, if the Court please, leading and suggestive, argumentative and not proper re-direct.

Mr. Carson: Well, it certainly is, and it is based

(Testimony of Dr. James Lytton-Smith.) upon the facts in evidence, Your Honor. There was evidence here introduced yesterday.

The Court: Well, I think that was why [177] X-rays were made, because that was not learned until she returned to Phoenix, was it?

Mr. Carson: I am speaking of Indio. If you will remember the evidence yesterday, there was evidence reported in the record without objection that there was measurements made of this right portion of the leg and it was 2½ inches shorter.

The Court: I know, but she didn't learn that until she reached Phoenix, because the artificial limb was shipped to her in Phoenix.

Mr. Carson: I know, but I am talking about the man that measured it before it was shipped over here, and he reported it to Mrs. Zane.

The Court: All right. When that was learned she went to Dr. Ryerson and Dr. Lytton-Smith.

Mr. Carson: I am talking about over there at Indio. She reported to Dr. Blackman that the man had said over there that probably she had a fractured hip; that is, the man that fitted the artificial limb, and that the right portion was 2½ inches shorter than the left.

The Court: I don't recall whether that was the testimony.

Mr. Carson: Well, that is in the testimony, and if the Court Reporter will refer back to his [178] notes, I am sure that fact was testified to. Did you testify to that, Mrs. Zane?

Mrs. Zane: Yes.

(Testimony of Dr. James Lytton-Smith.)

Mr. Baker: Just a minute. I object to that form of proving—

Mr. Carson: (Interrupting) Well, I'd like to refer to the Court Reporter's notes on it, if he can find it.

Mr. Baker: The question would not be proper even if there was any such condition.

Mr. Carson: It would go to the competency.

Mr. Baker: This is his own witness he is trying to argue with, incompetent.

Mr. Carson: No, no, I am not trying to argue with my witness. You brought out this evidence. It is on re-direct examination, whether or not, after the doctor discovered those facts he should have made an X-ray then of the hip. That is, I am talking about Dr. Blackman. Whether or not all those facts, had been reported to him, whether or not it would have been good medical practice to have it X-rayed. You have a femur bone at the time, after it had been reported to him that she had probably a fracture of the hip, and that portion was $2\frac{1}{2}$ inches shorter than the left. Now, it goes to the question of whether or [179] not the doctor knew, or probably knew, that that hip was fractured, or this femur was fractured, and the question of good faith.

Mr. Baker: He had that included in the long-winded question and the Court let him answer it over my objection.

Mr. Carson: No, it was not included in that question at all.

(Testimony of Dr. James Lytton-Smith.)

Mr. Baker: It was so, and my definite objection was on the ground that it was never proved in evidence any such thing. The Court let him answer.

Mr. Carson: The second portion of that question Mr. Baker objects to. At first he didn't. It was put into the record without objection.

The Court: This is becoming very confusing now. Read the question.

(The question was read by the Reporter.)

The Court: He may answer.

Mr. Baker: There is one statement there, there is no testimony here that anybody ever measured the right leg. The question was that somebody came out and measured her left limb.

Mr. Carson: Do you mean to say, Mr. Baker——

The Court: (Interrupting) You may answer.

A. I think I would have taken an X-ray.

Mr. Carson: That would have been good medical practice to have taken an X-ray?

A. Well, as we look at it now we know it would have been.

Mr. Carson: Doctor, if you were the attending surgeon and pain was reported to you in the upper portion of the leg, serious pain, would you have X-rayed the upper portion of her femur if continual pain had been reported to you?

A. I think I would.

Mr. Carson: I think that is all.

Mr. Baker: You are basing your opinion on what you know now, aren't you, Doctor?

(Testimony of Dr. James Lytton-Smith.)

A. Yes. It is quite obvious she should have had an X-ray.

Mr. Baker: That is all.

(Thereupon the witness was excused.)

JACK ZANE,

having been heretofore duly sworn, resumed the witness stand and testified further as follows:

Mr. Baker: You turn him over for cross examination?

Mr. Carson: Yes. [181]

Cross Examination

Mr. Baker:

Q. Mr. Zane, what is your occupation or profession? A. Electrical work.

Q. And how long have you been engaged in that occupation? A. Close to five years.

Q. Were you engaged in that occupation before Mrs. Zane was injured in this bus accident?

A. Right.

Q. And for how long before that time of the accident had you been so engaged?

A. Well, it would be over two years.

Q. And before the time of this accident what was your average monthly earnings from your work?

Mr. Carson: What does that have to do with it?

(Testimony of Jack Zane.)

The Court: I don't know, perhaps we will find out. Go ahead.

A. Well, that all depends on how much overtime you got then. We got a lot of overtime.

Mr. Baker: Well, what would your average monthly earnings be?

A. I'd say \$90.00 a week.

Q. At the time of the accident you had been [182] engaged in the same occupation?

A. Except the time I have been in the Navy, yes.

Q. Well, excepting the time you have been in the Navy, what has been your average monthly income from your—

A. (Interrupting): Since the time I returned from the Navy?

Q. Yes.

A. Well, about \$70.00 on an average; about \$70.00 a week on the average.

Q. Since the time from the Navy you made less than you did before?

A. That is right. You don't get the overtime you used to get on these jobs.

Q. But you averaged about \$70.00 a week?

A. That is right.

Q. Since the time of the injury? A. Yes.

Q. That is exclusive of the time you were in the service?

A. That is after the time I was in the service.

Q. What period of time were you in the service?

A. Close to eleven months. [183]

(Testimony of Jack Zane.)

Q. And in which service were you?

A. I was in the Navy, in the 5th Amphibious Force.

Q. What was your rating?

A. Seaman First.

Q. When was it you say you first learned of your wife's accident?

A. About six days after it happened.

Q. Where were you then? A. Yuma.

Q. Did you immediately go to Indio?

A. I did.

Q. And when did you arrive in Indio?

A. Early Friday morning. I am pretty sure it was Friday.

Q. Did you see your wife at that time?

A. I didn't get to see her until about—well, sometime in the early morning.

Q. What was her condition when you saw her?

A. She was in a bad fix.

Q. Had her leg been amputated at that time?

A. Yes.

Q. Did you talk with her?

A. Well, I stayed in the room for a few moments.

Q. Was it that same day you say Cameron?

A. No.

Q. When did you see Mr. Cameron?

A. Well, I saw him on the following Sunday.

Q. Did he make any mention of settlement of the case to you at that time? A. No.

(Testimony of Jack Zane.)

Q. None whatever? Never tried to discuss settlement with you at all? A. No.

Q. That is a fact? A. He didn't.

Q. When was the next time you saw Cameron?

A. Well, I don't know. I can only recall sure of twice seeing Cameron.

Q. You can only remember seeing him twice?

A. To be positive.

Q. When was the second time you saw him?

A. That was the day of the settlement.

Q. The day of the settlement. Now, before this day of the settlement had the matter of compensation to be paid to your wife been discussed with you? A. Yes.

Q. Your wife had discussed it with you?

A. Yes.

Q. Did she ever tell you what figure she [185] had arrived at? A. No, she didn't.

Q. She never did? A. Not for certain.

Q. Well, before the day of the settlement you knew what figure she had demanded, did you not?

A. I knew, yes.

Q. You knew she demanded \$15,000.00, is that right? A. Yes.

Q. She had told you before that, that that is what she was asking?

A. Well, she told me just a little before it was signed. I just arrived back from Las Vegas about that time.

Q. Did you object to her accepting that sum?

A. I never objected to her.

(Testimony of Jack Zane.)

Q. How is that? A. I did not.

Q. You never made any objection?

A. I did not.

Q. You thought that was satisfactory, did you not? A. At that time, yes.

Q. And you so told Mrs. Zane, is that right?

A. Not in those words, I didn't. I told [186] her if she was ready to sign it, I was.

Q. It was all right with you?

A. That is right.

Q. Whatever she thought was right you thought it was all right, that is a fact, isn't it?

A. Yes, for the reason, I stated, the way I figured, she was the one that should say yes or no. She was the one that was in the accident, it wasn't me.

Q. You were interested in your son who received some slight injuries, were you not?

A. That is right, and I made settlement for my son myself.

Q. You did that yourself? You got \$500.00 for that? A. Right.

Q. What did you do with that \$500.00?

Mr. Carson: Oh, we object to that.

The Court: That has not been tendered, has it?

Mr. Baker: No.

The Court: Why go into—

Mr. Stahl (Interrupting): It is not involved in this suit at all. That is money that belongs to the child. [187]

Mr. Carson: How could he use his money to

(Testimony of Jack Zane.)

tender to someone else, and that would be very doubtful indeed. Settlement could not be made without the appointment of a guardian, and how could that money be used for tender?

The Court: I will sustain the objection.

Mr. Baker: Well, you were paid \$500.00 on account of the injuries to your son?

A. Right.

Q. You say that was paid direct to you?

A. Right.

Q. That was not paid to your wife?

A. No, it was not.

Q. On this day that the settlement was effected, how long had you been talking to your wife before Mr. Cameron arrived?

A. Well, that is something I really can't answer. I don't know whether he arrived first or whether I did. It was just a short time between the arrival of either one of us.

Q. Now, what was the conversation that occurred at that time?

A. Well, it was about the settlement.

Q. What was the conversation?

A. And papers had been left there to be signed.

Q. Did you see any papers that had been left there? A. Yes, I did.

Q. What were those papers, what did they amount to?

A. Well, the papers that was left there, the best I know—I don't know the reading or anything in it. I know the amount was on it, was \$14,500.00.

(Testimony of Jack Zane.)

Q. All you know is the amount stated was \$14,500.00? A. Yes.

Q. What was the conversation, then?

A. Well, it was just to get down to the settlement. Mr. Cameron was there at the time.

Q. Well, before that time, before that day, had Mrs. Zane stated to Mr. Cameron what she wanted was \$15,000.00?

A. I don't know, I was not there at the time.

Q. Well, was that apparent from the conversation that you had when you were there?

A. That is right.

Q. It was. It was apparent that Mrs. Zane had already submitted her figures to Mr. Cameron?

A. Right. [189]

Q. And that is exactly what he paid her, wasn't it?

A. Well, he paid her fourteen thousand, five hundred.

Q. And \$500.00 for the child.

A. No, I got five hundred for the child.

Q. It was fifteen thousand all together?

A. Well, let's make it fourteen thousand, five hundred for Mrs. Zane.

Q. And \$500.00 for the child?

A. Payable to me.

Q. Yes, payable to you. A. That is right.

Q. Together with the hospital bills and expenses?

A. The hospital bills were brought in on another draft.

(Testimony of Jack Zane.)

Q. Well, that is what Mrs. Zane said she wanted, wanted the hospital bills paid and the expenses paid and fourteen thousand, five hundred.

A. They had made it sure to Mrs. Zane that they were paying the hospital bills.

Q. Well, Mrs. Zane demanded that they pay them, didn't she?

A. No, I don't think she really ever made a demand for that. [190]

Q. Did you ever see that telegram that she sent?

A. I did.

Q. Did you see it at the time she sent it?

A. No, I didn't.

Q. When did you see it?

A. When you had it here.

Q. That is the first time you ever saw it?

A. I didn't see it in my hands. I just heard you talk about it.

Q. She had talked to you about the settlement before she sent the telegram on January 29th?

A. She had talked to me about the settlement.

Q. And had advised you what demand she was going to make? A. That is right.

Q. And what she told you is the same demand that is made in that telegram? A. No.

Q. What did she tell you?

A. I believe the last time I talked to her about it, it was they had left a figure of \$12,000.00.

Q. Well, I am not asking you what they said they would pay, but I am asking you what she was going to demand from them.

(Testimony of Jack Zane.)

Mr. Carson: That is, if you know. [191]

A. Well, I really don't know the last demand she was going to make. I was in and out of there and I wasn't with my wife all the time.

Q. You would see her every time you came in?

A. That is right.

Q. And practically every time you came, that you were in Indio, the question of settlement was discussed, was it not?

A. I don't think every time.

Q. All right. Now, getting back to this day of February 19th, 1943, when the settlement was finally effected, you stated that Mr. Cameron was rough, did I understand you? A. He was.

Q. Now, in what respect was he rough?

A. Well, I really couldn't describe it, I guess. Come in there and he was tired of the settlement being delayed; he was sore. I was supposed to be back in Indio.

Q. In other words, he had refused to settle with your wife until you were present, that is a fact, isn't it?

A. No, I don't really think that was the trouble. He had lost enough time on the case, he said, and he would get in trouble with the main office and he was about to lose his job. [192]

Q. Is that the way you express him as being rough?

A. Yes, and he was flying around. He was in quite a stir about it.

Q. In other words, in answer to a question from

(Testimony of Jack Zane.)

counsel you stated he was trying to rush matters, too, is that right?

A. Well, it looked that way.

Q. Will you please tell me why he was so rough and tried to rush you? He was going to pay every dollar she asked and was there with checks to do it.

Mr. Carson: Isn't that rather argumentative, your Honor?

The Court: Yes.

Mr. Baker: It might be argumentative. How long did your wife stay in the hospital after the time of settlement?

A. Two or three weeks. I don't know the date.

Q. You don't know the date. Did you bring her back to Phoenix? A. I did.

Q. You were with her at that time?

A. Right.

Q. When did she get back to Phoenix, do you [193] know?

A. I believe we arrived in Phoenix on the 8th of March.

Q. Was she complaining of any pain when she got back to Phoenix?

A. Yes, she always complained then.

Q. What was her complaint of pain?

A. Pardon me?

Q. What has been her complaint as to pain?

A. Of the hurting of her leg.

Q. Of her leg? A. That is right.

Q. Had she complained continuously?

A. That is right.

(Testimony of Jack Zane.)

Q. Ever since she has been back?

A. Oh, not as often, as often as she used to, but still does.

Q. Now, when was the first time that she ever went to see a physician after she came back to Phoenix?

A. I couldn't swear to that truthfully. I don't know.

Q. You say you don't know?

A. I don't know.

Q. Were you in the Navy in 1943, in August?

A. I was not in the Navy, but I don't know, [194] I might have been out of town. I take on out of town jobs.

Q. You were not in the Navy when she was taken to the hospital here, were you?

A. I didn't say I was.

Q. So you don't know when she first went to a doctor, is that right?

A. No. She might have told me about when she went and I forgot about it.

Q. Do you know why she waited that long before she went to a doctor when she was in continuous pain? A. I don't know.

Q. You haven't any reason for that at all?

A. Well, one, she got enough of doctors for a while.

Q. Now, when did you first know that your wife had a fractured hip?

A. I believe that was after the first X-rays was taken.

(Testimony of Jack Zane.)

Q. After the first X-rays were taken?

A. Yes.

Q. And when was that, do you know?

A. I can't give any date on that one.

Q. Can't you give any date on that?

A. No. [195]

Q. Well, can you say approximately?

A. No, I can't.

Q. Well, it would have been somewhere in September, 1943? A. Well, I heard it here.

Q. On the stand?

A. The last two or three days. I didn't pay any attention. I don't know what it was.

Q. As far as you know, that is when it was, September, 1943?

A. I know it was after the first X-rays.

Q. That was the first time you ever had taken your wife to a physician, and the first time you knew her hip was fractured?

A. That is right.

Q. After you discovered that her hip was fractured did you ever telephone or talk to Dr. Blackman? A. That is right.

Q. When was that? A. That was after.

Q. Would you say that was in October, 1943?

A. I think that was.

Q. You threatened to sue him for malpractice, didn't you? A. I did not. [196]

Q. You called him on long distance 'phone, did you? A. Yes.

Q. To Dr. Blackman? A. Yes, right.

(Testimony of Jack Zane.)

Q. And you talked to him, did you?

A. Yes.

Q. Didn't you at that time threaten to sue him?

A. No.

Q. What did you tell him?

A. I told him he should be.

Q. You told him he should be sued?

A. That is right, I know.

Q. In other words, you didn't say, "I am going to sue you," but you said he should be sued, is that right? A. Yes.

Q. And you charged him with malpractice, didn't you? A. No, sir.

Q. Well, you charged him with the blame for your wife's condition, didn't you?

A. I haven't said it yet.

Q. You recited to him that she had to have an operation, didn't you tell Dr. Blackman? [197]

A. I told him about the operation that was going to be performed. I didn't know then they were going to perform the operation.

Q. You never filed any suit against Dr. Blackman?

Mr. Carson: We object to whether he filed a suit or whether he didn't.

The Court: Well, he said he had not.

Mr. Baker: You didn't attempt to, you never did? A. Pardon me?

Q. You never sued Dr. Blackman?

Mr. Carson: I object to the question whether

(Testimony of Jack Zane.)

he sued or whether he didn't sue. The question has been asked and answered.

The Court: He answered. He said he didn't.

Mr. Baker: Now, did you at that time or any other time before this suit was filed, ever make any demand upon the Pacific Greyhound Lines on account of your wife? A. No.

Mr. Carson: We object to that. It don't make any difference.

Mr. Baker: Well, that is important.

The Court: Well, he answered.

Mr. Baker: And the first request that was [198] ever made to the Pacific Greyhound Lines was when this suit was filed? A. Right.

Q. This suit was filed on December 9, 1944, is that correct? A. I guess it is.

Q. Why did you wait for that length of time to file the suit against the Greyhound Lines or make any demand upon them?

A. Why couldn't I answer it this way? That I was out of town when it was filed and I didn't file it.

Q. And your suit was filed just two days before the statute of limitations ran.

The Court: Well, he might not know that.

Mr. Carson: He probably didn't know what the statute of limitations was.

The Court: We will suspend until 2 o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12 o'clock noon.)

(Testimony of Jack Zane.)

Two o'clock P. M. of the same day, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows: [199]

Jack Zane resumed the witness stand and testified further as follows:

Cross Examination (Resumed)

Mr. Baker:

Q. Mr. Billar, will you give me the last question and answer?

(The last question and answer was read by the Reporter.)

Mr. Baker: Mr. Zane, referring to the time of the settlement that occurred on February 19th, handing you Defendant's Exhibit D in evidence, being a release in full. Is that your signature appended to that (handing document to witness) ?

A. Right.

Q. That is your signature, is it not?

A. Yes.

Q. Are those the signatures of the witnesses?

A. Right.

Q. Mr. Cameron was there and also Alpha R. Marcum was there when it was signed?

A. Right.

Q. Handing you Defendant's Exhibit C, being a voucher or a check, together with a receipt and release payable to Zoa Zane and Jack Zane, her husband, in the Coachella Valley Hospital, [200] in the sum of \$14,500.00. Is that your signature to the receipt and release on that?

Mr. Carson: Is that fourteen thousand, five hundred, Mr. Baker?

(Testimony of Jack Zane.)

Mr. Baker: \$14,500.00.

A. Right.

Q. Is that your signature also? A. Right.

Q. On the endorsement on the face?

A. Right.

Q. Is that your signature on the back of it?

A. Yes. I looked at all of them.

Q. I hand you Defendant's Exhibit D in evidence, being a voucher or a check payable to Jack Zane and Zoa Zane, husband and wife, in the Coachella Valley Hospital, and Doctor W. H. Blackman, in the sum of \$1,467.00. Is that your signature on the release and receipt part of that voucher? A. That is right.

Q. Is that your receipt on the endorsement, or your signature, rather, on the endorsement?

A. Right.

Q. Referring to Defendant's Exhibit C, a check for \$14,500.00. What was done with that [201] after it was delivered?

A. It was taken to the bank.

Q. Who took it? A. I did.

Q. And when did you take it to the bank?

A. Well, it was three or four days. I wouldn't make that exact because I don't know.

Q. So Mrs. Zane held that voucher in her possession for three or four days?

A. For a few days?

Q. What bank did you take it to?

A. It was the bank—I think it was the Bank of America.

(Testimony of Jack Zane.)

Q. Did you cash it or deposit it ?

A. Deposited it.

Q. In whose name? A. Zoa Zane.

Q. And how long did that money stay there?

A. Well, it was a \$500.00 deposit. The rest of it was made into Traveler's Checks, or something, the same as that. It was returned to her and the check in the amount of \$500.00 was left, and the balance was drawed out after we came to Phoenix.

Q. So there was \$500.00 deposited in the bank and the rest, you say, was in Traveler's [202] Checks?

A. It wasn't Traveler's Checks, but it was—

Q. (Interrupting): Cashier's Checks?

A. Right.

Q. Something of that sort. Anyway, only \$500.00 was deposited in the bank at Indio? A. Right.

Q. I am handing you Defendant's Exhibit D in evidence. That is a check for \$1,467.00. What was done with that check after it was delivered to you?

A. It was turned over to the hospital.

Q. By you?

A. No, I don't think so. I think Mrs. Marcum picked it up.

Q. You think Mrs. Marcum picked it up?

A. I wouldn't say for certain. I am pretty sure she did.

Q. That was after you and your wife had signed it? A. That is right.

Q. That covered the hospital bill and the doctors', did it not? A. Right.

(Testimony of Jack Zane.)

Q. When you came back to Phoenix who [203] handled the money that was brought back with you?

A. It was deposited in my wife's name here in the bank?

Q. Who made the deposit?

A. My wife did.

Q. You didn't do that yourself? A. No.

Q. Do you know the amount that she deposited there at that time? A. I do not.

Q. You are not familiar with it? A. No.

Q. Deposited it in her name? A. Right.

Q. Not subject to double check; I mean, it was not subject to your check? A. No.

Q. Solely subject to her check?

A. That is right.

Q. After the deposit was made. Are you familiar with any of the expenditures made out of that fund?

A. Oh, I can say a few but not call them off.

Q. I don't know whether you know about this, but to save time of putting you back on the stand, [204] and I don't know what Mrs. Zane will testify. She may testify she does not know about this. Mark these two for identification, please, each one separate.

(The documents were marked as Defendant's Exhibits K and L for identification.)

Mr. Baker: I am handing you this Exhibit marked K for identification payable to Cash, dated April 14th, 1943, \$1,900.00.

A. Yes, I remember that.

(Testimony of Jack Zane.)

Q. What was that for?

A. That was for bonds.

Q. You still got the bonds?

A. I would not say as to that.

Q. Do you know whether or not?

A. I don't.

Q. Do you know whether they have been cashed in? A. I don't.

Q. That was for bonds?

A. That is right.

Q. For Defense Bonds? A. Yes.

Q. Did you buy them yourself?

A. No, not those.

Q. You didn't buy these, is that right? [205]

A. Well, there is some there that I did. This is Woolworth.

Q. This is not Woolworth, this is to Cash and no endorsement on the check. Apparently it was cashed right there at the bank by whomever it was cashed.

A. Well, they were paid at the bank that we bought the bonds.

Q. April 14th, 1943? A. Yes.

Q. You didn't handle it yourself?

A. Not that one.

Q. You don't know what became of the bonds or where they are now?

A. No; none of my business.

Q. All right. I hand you Defendant's Exhibit L marked for identification, being a check dated February 1st, 1944, in the sum of \$107.50 payable to Wesley Bolin, J of P. Do you know about that?

(Testimony of Jack Zane.)

A. Yes.

Q. What was that for? A. Speeding.

Q. For speeding, and whose fine was it, yours or your wife's? A. It was mine. [206]

Q. That was your fine. You paid a fine of \$107.50, is that correct? A. That is right.

Q. Or, rather, your wife paid your fine?

A. No.

Q. That is her check, is it not?

A. That is right. I paid my own fine.

Q. I hand you a check—do you know George R. E. Milligan?

A. I believe he runs a brake shop down here.

Q. This was cashed in Los Angeles. Do you know anything about that? Maybe that is a brake shop in Los Angeles. I don't know, I am just wondering.

A. Well, I heard her talk of him.

Q. You are not familiar with that check, though. Here is a check payable to Daniel's, \$25.25. Do you know anything about that? A. No.

Q. You don't know anything about that?

A. My wife never *come* asked me every time she wanted to write a check.

Q. There is another check for Daniel's, \$318.75. Do you know anything about that? A. Yes.

Q. What is that?

A. I drew that myself.

Q. Signed by her? A. Yes.

Q. Zoa Zane? A. Right.

Q. And that is dated May 12th, 1943?

A. That is right.

(Testimony of Jack Zane.)

Mr. Baker: I will mark this for identification.

(The document was marked as Defendant's Exhibit M for identification.)

Mr. Baker: The questions I have just asked you refer to Defendant's Exhibit M marked for identification. What does that check represent?

A. I don't know.

Q. I thought you said you did know about that check to Daniel's?

A. I did. \$318.00. I thought that was another one for \$18.75.

Q. No, \$318.75. A. I see it now.

Q. Do you know about that? A. I do.

Q. What is that? A. \$318.75. [208]

Q. I know, what does that represent; what does it represent in the way of a purchase?

A. I got the money off my wife and made a purchase myself.

Q. What did you purchase with it?

A. A ring and a watch.

Q. In other words, that is the Daniel's Jewelry Company, you purchased a ring and a watch?

A. That is right.

Q. You got the money from your wife, is that correct? A. That is right.

Q. Here is a check for \$850.00 payable to Henry Krakower. It says, "Pd. full LaS. sedan." Do you know anything about that check? A. Yes.

Mr. Carson: Your Honor, aren't they going into something that they heard afterwards that has no relation to the question of tender at all?

(Testimony of Jack Zane.)

The Court: I don't think so.

Mr. Baker: Mark this for identification, please. He has identified it.

(This document was marked as Defendant's Exhibit N for identification.)

Mr. Baker: The check that I have just described to you as Defendant's Exhibit N marked [209] for identification, being a check dated August 13th, 1943, in the sum of \$850.00 payable to Henry Krakower—

Mr. Stahl (Interrupting): If the Court please, wouldn't the proper way be to identify the checks and then offer them, rather than reading them before they are admitted?

Mr. Baker: Possibly so. I was just trying to save time. The reason I didn't want to mark them for identification is, he can't identify them. That is the only reason I am doing that. That check, you know about it, do you?

A. That is when she bought her car.

Q. That represents the purchase of a car?

A. Yes.

Mr. Stahl: What was the date of that check?

Mr. Baker: August 13th, 1943. Is Snirr the man you bought the house from? A. Right.

Q. You also bought furniture from him?

A. Right.

Q. This check represents what you paid him for the furniture, is that right?

A. That is right.

Mr. Baker: Mark this for identification, please.

(Testimony of Jack Zane.)

(The document was marked as Defendant's Exhibit O for identification.)

Mr. Baker: Do you know anything about the J. E. Duncan—I will hand you this and ask if you know anything about that? A. No.

Q. You don't know anything about it. Do you know anything about this check? A. No.

Q. You don't know anything about that. Do you know anything about this check? A. Yes.

Mr. Baker: We will mark this for identification.

A. I bought bonds with that.

Mr. Baker: All right.

(The document was marked as Defendant's Exhibit P for identification.)

Mr. Baker: Defendant's Exhibit P for identification which I am handing you, what does that represent? A. Bonds bought at Woolworth's.

Q. You bought Defense Bonds with this?

A. Yes.

Q. Do you still have them?

A. I don't know. It is something that don't [211] belong to me, I am not even interested in it.

Mr. Carson: Mr. Baker, Dr. Palmer is here, could I put him on the stand?

Mr. Baker: Wait a minute, it won't take me very long. Do you know anything about this check?

A. Yes.

Mr. Baker: Mark this for identification, please.

(The document was marked as Defendant's Exhibit Q for identification.)

(Testimony of Jack Zane.)

Mr. Baker: Defendant's Exhibit Q represents what?

A. That was paid for a washing machine?

Q. For a washing machine. Do you know anything about this check? A. Yes.

(The document was marked as Defendant's (Exhibit R for identification.)

Mr. Baker: Defendant's Exhibit R is a check representing what?

A. Furniture bought at the Barrows Furniture Company.

Q. That is in addition to the furniture purchased from Snirr? A. Yes. [212]

Q. Do you know anything about this check payable to you, Jack Zane?

A. I don't recall it, what it was for.

Q. You don't remember anything about that check? A. No, I don't.

Q. Do you know anything about this check payable to Ed Rudolph?

A. Could not be positive, no.

Q. You are not sure about that? Do you know anything about this check I am handing you payable to Daniel's? A. No.

Q. You don't know anything about that? Do you know anything about this check I am handing you payable to Jack Zane?

A. No, I don't know, not for what it is for.

Q. Do you know anything about this check payable to Daniel's? A. No, I don't.

(Testimony of Jack Zane.)

Q. Do you know anything about this check payable to C. P. Stephens?

A. Well, a lot of these checks were made while I wasn't here. How am I going to know what they are for? [213]

Q. I am asking you. I am not arguing with you about it. Do you know anything about this check payable to C. M. Ramsey? A. No.

Q. Do you know anything about this check payable to John Patrick Reilly?

A. Yes. I think that was made when I made an emergency leave home. This work was done on the car.

Mr. Baker: Mark that for identification, please.

(The document was marked as Defendant's Exhibit S for identification.)

Mr. Baker: Defendant's Exhibit S represents what, did you say, a check payable to John Patrick Reilly? A. That was done on the car.

Q. Do you know anything about this check payable to M. R. Brown? A. Yes.

Mr. Baker: Mark this for identification, please.

(The document was marked as Defendant's Exhibit T for identification.)

Mr. Baker: Defendant's Exhibit T for identification represents what? [214]

A. That is a payment for a Ford coupe.

Q. A payment for a Ford coupe?

A. 1926 Ford coupe. It says there, "Payment in full for Ford coupe."

(Testimony of Jack Zane.)

Mr. Baker: Do you wish to put the doctor on now? I am not through cross examining. I am through with this end of it.

Mr. Carson: Yes.

(Thereupon the witness was temporarily excused.)

DOCTOR CHARLES B. PALMER

was called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Carson:

Q. Your name?

A. Charles B. Palmer.

Mr. Carson: Are his qualifications admitted?

Mr. Baker: Yes.

Mr. Carson: You practice medicine and surgery here, Doctor?

A. Yes.

Q. Mrs. Zane, this lady right here, did you ever meet her, Doctor, or have occasion to [215] examine her, Mrs. Zoa Zane? A. Yes, sir.

Q. Do you know when that was or about what time?

A. Well, somewhere in October, 1944, and two or three times since.

Q. Do you remember why she came to see you, or on what occasion?

A. Yes, she came to see me regarding an injury

(Testimony of Doctor Charles B. Palmer.)
that she had sustained, if I remember rightly, in December, 1942, and the—her person and her condition at the time that she came to see me; that is, the fall of 1944.

Q. She came to see you in regard to an examination to see about whether she could bear children or not, or something to that effect?

Mr. Baker: Oh, we object. That is leading and suggestive.

The Court: Yes.

Mr. Carson: Doctor, you made an examination of her did you?

A. Yes, sir.

Q. At that time did she show you some X-rays?

A. Yes, sir.

Q. Now, I am—this is Plaintiffs' Exhibit [216] B in evidence. You look at that, Doctor, do you remember that?

A. Well, I couldn't say whether this is the one, but I have seen similar ones. I should think that this is probably it.

Q. Plaintiffs' Exhibit 3, was that also shown to you at that time?

A. Well, I think that these are the pictures.

Q. Doctor, do you know what those X-ray pictures indicate? Will you look at these X-ray pictures and see what they indicate?

A. Yes, sir. Both pictures are—well, this picture is a picture of the pelvis of this individual, and it shows an injury to the right femur; also shows the left femur which apparently is normal. The

(Testimony of Doctor Charles B. Palmer.)

right femur, my interpretation of it is, that there has been a fracture of the neck of the femur, the right femur, and it is now un-united. I could not tell on that about it being un-united, but I know that from my examination. Also, there are certain changes in the shaft of the right femur which I think are—go along with an injury to the neck of the femur.

This can easily be seen by comparing the normal left femur with the abnormal right femur. [217] The fracture is through the external portion of the neck of the femur and also involves a little bit of the upper end of the femur or thigh-bone.

Q. Now, the interpretation of the other X-ray, Doctor.

A. The other X-ray looks to be a different view of the right femur showing the site of the fracture of the right femur through the outer portion of the neck of the femur. It also appears that it has—shaft of the femur has not united with the head of the femur. Do you want me to tell you a little more about this?

Q. Yes, go right ahead.

A. Of course, I knew at that time that she had been operated on, and as I understand, the object of that operation was to bring the two fragments close together by the implant of bone from another part of her bony skeleton in order to make this femur a continuous bone so there would not be a false joint, an extra false joint there.

(Testimony of Doctor Charles B. Palmer.)

Q. Doctor, did you make any further examinations—did you make an examination of Mrs.—

A. (Interrupting): Yes, I made an examination of her whole body, you might say.

Q. Did you make a vaginal examination? [218]

A. Yes, including a vaginal examination.

Q. Will you tell what you found?

A. Well, I found that she was a pretty healthy woman from examination, which includes the past history. I found that she was the mother of two children. I questioned her to find out if her marital relations were all right—

Mr. Baker (Interrupting): Oh, we object to that, if the court please, purely hearsay.

Mr. Carson: Your Honor, it is a question of damages. We allege that she can't have children and she can't be a normal wife. That was one of the purposes of the examination.

The Court: What do you mean by "marital relations?" That covers a good many things.

Mr. Carson: I beg your pardon?

The Court: I say, what does it mean when he says "marital relations?" It covers a good many things.

Mr. Carson: What do you mean, Doctor, when you say—

A. (Interrupting): Well, she wanted to know if she could have children. That is the gist of the whole matter. I asked her, well, could—

Mr. Baker (Interrupting): I object to [219] what he asked her, the conversation.

(Testimony of Doctor Charles B. Palmer.)

Mr. Carson: Listen, you mean to say the doctor can't ask questions on examination for—make an examination? Your Honor—

The Court (Interrupting): Oh, keep still. What did you tell him—

Mr. Baker (Interrupting): What did he tell her?

The Court: I say, what did you tell her about having children? She wanted to know if she could have children?

The Witness: Yes.

The Court: What did you tell her?

A. I told her I didn't know, that I would have to find out what the difficulty was, by having intercourse, and so forth, and also whether her female sexual organs were competent to go on and have children. I drew my conclusions from my examination and what I asked her.

Mr. Carson: What were your conclusions, Doctor?

A. Huh?

Q. What were your conclusions?

A. Well, my conclusion was that she had a moderate retroflexion of the uterus and that probably she would have difficulty in carrying a child [220] with such disability in her leg, and that sort of thing, because it is pretty hard for a woman to have a baby when she is handicapped by any such thing as that, but I told her that I thought the only way absolutely known was by a trial, but she said that she had—

(Testimony of Doctor Charles B. Palmer.)

Mr. Baker (Interrupting): We object to what she told him, if the Court please.

The Court: All right.

Mr. Carson: What was the Court's ruling?

The Court: Sustained.

Mr. Carson: Doctor, from your examination did you come to any conclusion as to whether or not she could wear an artificial limb?

A. Well, with a false joint in the hip it would be very much more difficult to wear an artificial limb than it would be if you just had a false joint without an amputation below it.

Q. Doctor, assume that this hip here is fractured as you found, what about weight bearing as applied to wearing an artificial limb, as to weight bearing—weight?

A. What was the question?

Q. As to wearing an artificial limb?

Mr. Baker: Oh, he already asked him that, if the Court please. He has answered. [221]

The Court: Read the question.

(The question was read by the Reporter.)

The Court: If you can't answer, just say so.

A. I don't think I can.

Mr. Carson: Well, Doctor, what about weight bearing with a fractured limb, that is, bearing weight on an artificial limb, can you tell us something about that?

A. Well, if your hip is all right and unfractured, it would be much stronger than a hip that was frac-

(Testimony of Doctor Charles B. Palmer.)
tured with an un-united condition as the point of
the fracture.

Q. In other words, with a fractured hip it would
be rather hard to bear any weight on an artificial
limb, isn't that right?

Mr. Baker: That is leading and suggestive, if
the Court please.

The Court: Yes.

Mr. Carson: Doctor, state if you can, the diffi-
culty in wearing an artificial limb with a fractured
hip?

Mr. Baker: I think that has been asked and
answered; asked him his opinion.

The Court: Go ahead and answer it; answer
the question. [222]

Mr. Carson: Where there is a dis-united joint?

A. When you have a fractured base or an arti-
ficial limb you would have to increase the mobility
and it would have a tendency to ride up over the
joint where it should be—where the joint should
hold it firmly, because all the body weight above
would come down and it would sag down and you
don't want any sagging down there. That is why
you have a bone there, to keep it rigid.

Mr. Carson: That is all.

Cross-Examination

By Mr. Baker:

Q. What date did you make your examination,
Doctor; what date did you make your examination?

(Testimony of Doctor Charles B. Palmer.)

A. Well, I would say that it was in October, 1944.

Q. October, 1944? A. Yes, sir.

Q. That is, this past fall? A. Yes, sir.

Q. What date were those X-rays made that you have in your hand?

A. Well, these are 1945—no, I don't know whether it is or not.

Mr. Carson: Let me see the date. [223]

The Witness: Just a minute, I will tell you. These were made June 13th, 1944.

Mr. Baker: June, 1944?

A. Yes, sir.

Mr. Baker: That is all.

A. And this one was made June 13th, 1944.

Mr. Baker: That is all.

Mr. Carson: That is all.

(The witness was excused.)

JACK ZANE

resumed the witness stand and testified further as follows:

Cross-Examination—(Resumed)

By Mr. Baker:

Q. Who is Clara Zane? A. Sister-in-law.

Q. Your sister-in-law? A. Yes.

Q. Married to your brother? A. Right.

Q. Has been employed in your house?

(Testimony of Jack Zane.)

A. She used to be.

Q. She used to be, in what capacity?

A. She kept house for the wife there for a while.

Mr. Baker: I think that is all. [224]

Re-Direct Examination

By Mr. Carson:

Q. Jack you paid your sister-in-law—that last question that was asked, was that while you were in the Navy you hired somebody to come there and work for your wife?

A. Well, that was before and after, too.

Q. Now, Mr. Baker has asked you a question, Mr. Zane, about a conversation, that you called Dr. Blackman in, I think in the fall—sometime in October, 1943. Do you remember why you called over there—why you called him at Indio?

A. Yes, I called him in regards to some X-rays.

Q. What did you ask him about that?

A. If he had them.

Q. What did he say?

A. He said if he had them—he said he didn't have them and if he had them I couldn't get them because it was his property.

Q. You wanted to know if some X-rays had been taken of that hip? A. That is right.

Mr. Carson: I think that is all.

(Thereupon the witness was excused.) [225]

ZOA H. ZANE

resumed the witness stand and testified further as follows:

Re-Cross Examination—(Resumed)

By Mr. Baker:

Q. Mrs. Zane, I am handing you Defendant's Exhibit M for identification, being a check. Do you know of that check? A. Yes, I do.

Q. You executed that check, did you?

A. Yes.

Q. And it is payable to Daniel's?

A. Yes, that is right.

Q. What was the purpose of it?

A. I bought myself and my husband a wrist watch.

Mr. Baker: I offer this in evidence.

Mr. Stahl: What date was that?

Mr. Baker: August 12th, 1943.

Mr. Stahl: No objection.

(The document was received as Defendant's Exhibit M in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT M

Phoenix, Arizona, Aug. 12, 1943

No. 3

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of Daniels - - - - - \$318.75
Three Hundred, Eighteen and 75/100 - Dollars

ZOA ZANE

1722 W. Tonto

[Initialed in pencil]: OK Sid

[Stamped on Back of Check]:

Pay to the Order of First National Bank of Arizona, Head Office, Phoenix 340, Jewelry Company.

Mr. Baker: I hand you a check, Defendant's Exhibit K marked for identification, in the sum of \$1,900.00 Do you know of that check?

A. Yes, sir.

Q. That was payable to Cash, was it? [226]

A. Yes.

Q. And what was done with that money?

A. Well, some bonds were bought with it.

Q. Where are those bonds?

A. I still have some of them.

Q. How much were they?

A. I don't know whether the ones I have were bought on this day or some later day.

(Testimony of Zoa H. Zane.)

Q. How many dollars worth of bonds do you have now at the present time?

A. Oh, I think I have two \$1,000.00 bonds.

Q. Two \$1,000.00 bonds? A. Yes.

Q. You never cashed? A. No.

Mr. Baker: We offer this in evidence.

Mr. Stahl: What was the date of that?

Mr. Baker: August 14th, 1943.

(The document was received in evidence as Defendant's Exhibit K.)

DEFENDANT'S EXHIBIT K

Phoenix, Arizona, April 14, 1943

No. 6

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of Cash - - - - - \$1900.00
One Thousand and Nine Hundred - - Dollars
ZOA ZANE

The Witness: That was April, wasn't it?

Mr. Baker: You are right. It was April 14th—excuse me. I hand you Defendant's Exhibit L marked for identification, a check payable to Wesley Bolin. Do you know about that check?

A. Yes. [227]

Q. What was that for?

A. Jack got picked up for speeding.

(Testimony of Zoa H. Zane.)

Q. That check was for the sum of \$107.50, is that right? A. Yes.

Q. Dated February 1, 1944, is that correct?

A. Yes.

Mr. Baker: We offer that in evidence.

DEFENDANT'S EXHIBIT L

Phoenix, Arizona, Feb. 1, 1944

No. 7

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of Arizona

Pay to the Order of Wesley Bohn, J. of P. - \$107.50
One Hundred and Seven and 50/100 - - Dollars

ZOA ZANE

[Stamped on Back of Check]:

Pay to First National Bank of Arizona, Phoenix,
Arizona, on Order Wesley Bohn, Justice of the
Peace, West Phoenix Precinct.

Mr. Stahl: I don't have any particular objection, however, if the Court please, I think the allegations of our complaint in reference to tender were simply to the effect that prior to discovery of this injury she spent a portion of this money and it was necessary for her to spend some of it in connection with that, in connection with her injuries, and that she was unable to tender. Whether it is material to go into all of these matters to show how she spent

(Testimony of Zoa H. Zane.)

all of this money, except she spent an amount that she could not be able to make a tender of \$14,500.00.

The Court: It is hard to know where to draw the line.

Mr. Stahl: Of course, in addition to that, in the matter of tender, Your Honor, it was held that it was really unnecessary in a case of this kind. For instance, in the Peterson case decided [228] in the Supreme Court here, it was stated there was no tender required in a case of this nature only in the case of fraud.

The Court: You have alleged it here for your purpose, now Mr. Baker can go ahead and try his case the way he wants to.

Mr. Baker: I hand you Defendant's Exhibit N marked for identification, being a check dated August 13th, 1943, payable to Henry Krakower, in the sum of \$850.00. Do you know anything about that?

A. Yes.

Q. What was that for?

A. This was for the LaSalle.

Q. LaSalle automobile? A. Yes.

Q. A new one? A. No.

Q. Second-hand one? A. Yes, sir.

Mr. Baker: Mark that in evidence.

(The document was marked as Defendant's Exhibit N in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT N

Phoenix, Arizona, Aug. 13, 1943

No. 5

91-1 Head Office 91-1
Washington at First Avenue
First National Bank of Arizona

Pay to the Order of Henry Krakower - - \$850.00
Eight Hundred and Fifty and no/100 - Dollars
ZOA ZANE

[Written in margin]: Pd. full LaS. Sedan.

[Endorsed on back]: Henry Krakower.

Mr. Stahl: What date?

Mr. Baker: August 13th, 1943. I hand you Defendant's Exhibit O marked for identification, [229] being a check dated August—well, just August is all—194—I don't know, it has no date on it. Do you know that check?

A. Yes.

Q. That was for the furniture that you paid to Mr. Snirr whom you bought your house from?

A. Yes.

Q. In the sum of \$650.00? A. Yes.

Q. You bought the house and also the furniture?

A. It was listed together as one price.

Mr. Baker: I offer that in evidence. Do you know what date that is?

A. I think that is supposed to be August the 2nd.

Mr. Baker: You think August the 2nd?

(Testimony of Zoa H. Zane.)

A. Yes, August 1st or 2nd.

Q. 1943? A. Yes.

Mr. Stahl: And the amount?

Mr. Baker: \$650.00.

Mr. Stahl: No objection.

(The document was marked as Defendant's Exhibit O in evidence.)

Mr. Baker: I hand you Defendant's Exhibit [230] P marked for identification. Do you know that check?

A. Yes, sir.

Q. That was to Woolworths? A. Yes.

Q. That was for bonds? A. Yes.

Q. In the sum of \$975.00? A. Yes

Q. Do you have those bonds, or do you know?

A. I may have some of them.

Mr. Baker: We offer this in evidence.

(The document was marked as Defendant's Exhibit P in evidence.)

DEFENDANT'S EXHIBIT P

Phoenix, Arizona, Sept. 17, 1943

No. 8

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of F. W. Woolworth - \$975.00
Nine Hundred and Seventy Five - - - Dollars

ZOA ZANE

[Endorsed on Back]: F. W. Woolworth—
Juanita Crouch. Bonds

(Testimony of Zoa H. Zane.)

Mr. Baker: Defendant's Exhibit Q marked for identification, being a check dated December 20th, 1944, payable to Mrs. B. B. Henry, in the sum of \$87.00, what is that, Mrs. Zane?

A. That was for a washing machine.

Q. That was for a washing machine?

A. Yes.

Mr. Baker: Unless you want that in evidence, I am not interested in the washing machine.

Mr. Carson: They are hard to get hold of, Mr. Baker.

Mr. Baker: I am not offering this in [231] evidence. Handing you Defendant's Exhibit Number T for identification, being a check dated April 23rd—is that 1943?

A. 1945.

Q. 1945? A. Yes.

Q. Payable to M. R. Brown, in the sum of \$385.00. What was that for?

A. V-8 coupe.

Q. Another automobile? A. Yes.

Mr. Stahl: What was the date?

Mr. Baker: April 23rd, 1945, payable to M. R. Brown in the sum of \$385.00.

(The document was marked as Defendant's Exhibit T in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT T

Phoenix, Arizona, April 23, 1945

No. 5

91-1 Head Office 91-1

 Washington at First Avenue

 First National Bank of Arizona

Pay to the Order of M. R. Brown - - - \$385.00

Three Hundred and Eighty-Five - - - Dollars

ZOA ZANE

Full payment on '36 V-8 Coupe.

[Endorsed on Back]: Malwin R. Brown

Mr. Baker: I hand you Defendant's Exhibit S marked for identification, being a check dated January 14th, 1945, payable to John Patrick Reilly in the sum of \$73.15. What was that for?

A. For mechanical work.

Q. On an automobile? A. Yes.

Mr. Baker: We offer that in evidence.

(The document was marked as Defendant's Exhibit S in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT S

Phoenix, Arizona, Jan. 14, 1945

No. 21

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of ArizonaPay to the Order of John Patrick Reilly - \$73.15
Seventy-Three and 15/100 - - - - Dollars
ZOA ZANE

[Endorsed on back]: John Patrick Reilly.

Mr. Baker: I hand you Defendant's Exhibit R for identification, being a check dated October 11th, 1943, payable to Barrows Furniture Company, in the sum of \$200.00. That was for furniture?

A. Yes.

Mr. Baker: I offer that in evidence.

(The document was received and marked as Defendant's Exhibit R in evidence.)

Mr. Baker: Is this check I am handing you for Milligan and Company, is that for your artificial limb, in Los Angeles? A. Yes.

Q. \$275.00 you paid for that? A. Yes.

Q. You stated that you didn't see a doctor after you returned to Phoenix until August of 1943, when you went to Dr. Ryerson? A. That is right.

Q. I hand you a check dated March 24th, 1943, payable to P. M. Ryerson, and ask you to look at that please. A. Yes, I remember that.

(Testimony of Zoa H. Zane.)

Q. Was that in payment for his services?

A. Not to me, to the baby. He had gatherings in his head.

Q. That was for the baby, not for you. I [233] hand you a check payable to Daniel's in the sum of \$25.25. Do you know about that check?

A. Oh, it was probably for Mother's Day present. It was around that time.

Q. For jewelry? A. Probably.

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was marked as Defendant's Exhibit Q in evidence.)

DEFENDANT'S EXHIBIT U

Phoenix, Arizona, May 6, 1943

No. 9

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of Arizona

Pay to the Order of Daniels - - - - - \$25.25
Twenty-five and 25/00 - - - - - Dollars
ZOA ZANE

[Initialed in pencil]: OK SHS #30207—Cash.
1921 E. Portland

[Stamped on back of check:]

Pay to the Order of First National Bank of Arizona, Head Office, Phoenix 340, Daniels Jewelry Company.

(Testimony of Zoa H. Zane.)

Mr. Baker: This check I hand you for \$4,300.00, I presume, was in payment for your house, is that correct?

A. Yes.

Q. That is the time you purchased the house, on August 2nd, 1943? A. Yes.

Q. For \$4,300.00?

A. Well, it was listed with the furniture included, which made it \$4,950.00.

Q. I hand you a check payable to J. E. Duncan. I will ask, who is J. E. Duncan?

A. Well, I bought a sewing machine from them.

Q. A sewing machine? A. Yes. [234]

Mr. Baker: I am not interested in sewing machines. I hand you a check dated September 2nd, 1943. Who was that payable to? I can't quite make it out. A. Mrs. W. T. Brunlow.

Q. What was that check for? A. It was a loan.

Q. You loaned her the sum of \$400.00, is that correct? A. Yes.

Q. With this check? A. Yes.

Q. Who is she? A. She was a friend.

Mr. Baker: We offer this in evidence.

Mr. Stahl: What is the date of that?

Mr. Baker: September 2nd, 1943, payable to Mrs. W. T. Brunlow, \$400.00, which she says is a loan.

(The document was marked as Defendant's V in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT V

Phoenix, Arizona, Sept. 2, 1943

No. 20

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of Mrs. W. T. Brunlow - \$400.00

Four Hundred and no/00 - - - - - Dollars

ZOA ZANE

[Endorsed on back]: Credited to Account of W. T. Brunlow, First National Bank of Arizona 2, Phoenix, Arizona. Showalter, Teller.

Mr. Baker: Handing you a check payable to Jack Zane, dated November 22nd, 1943. Do you know anything about that?

A. No, I don't recall what it was for. To pay some bills, I suppose. It was while I was in bed at the time. [235]

Q. This was payable to Jack Zane in the sum of \$300.00? A. Yes.

Q. You can't recall the purpose?

A. The purpose it was put to, no.

Mr. Baker: We offer it in evidence for what it is worth.

Mr. Stahl: The check is dated the 22nd of November.

(The document was received as Defendant's Exhibit W in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT W

Phoenix, Arizona, Nov. 22, 1943

No. 13

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of ArizonaPay to the Order of Jack Zane - - - - \$300.00
Three Hundred and no/00 - - - - Dollars
ZOA ZANE

[Endorsed on back]: Jack Zane.

Mr. Baker: A check payable to Ed Rudolph in the sum of \$50.00. Do you know anything about that?

A. Yes.

Q. What is that?

A. A paint job on the LaSalle.

Q. A paint job on the LaSalle? A. Yes.

Mr. Baker: We offer that in evidence, dated December 1, 1943, payable to Ed Rudolph, \$50.00.

(The document was received as Defendant's Exhibit X in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT X

Phoenix, Arizona, Dec. 1, 1943

No. 18

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of Ed Rudolph - - - - - \$50.00

Fifty and no/00 - - - - - Dollars

ZOA ZANE

[Endorsed on back]: Pay to First National Bank
of Arizona, Phoenix, Arizona, or Order. Edw.
Rudolph.

Mr. Baker: Here is another check to Daniel's.
Do you know anything about that check?

A. No, I don't recall what that is for. [236]

Q. Well, that is a jewelry firm—store, is that
right? A. Yes.

Mr. Baker: We offer this in evidence.

A. They also do repair work and sell dishes and
furniture or silverware.

Mr. Baker: Dated December 23rd, 1943, pay-
able to Daniel's, in the sum of \$15.00.

(The document was received as Defendant's
Exhibit Y in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT Y

Phoenix, Arizona, Dec. 23, 1943 No. 13

91-1 Head Office 91-1
Washington at First Avenue
First National Bank of ArizonaPay to the Order of Daniels - - - - \$15.00
Fifteen and no/00 - - - - - Dollars
ZOA ZANE

[Endorsed on back of check:]

Pay to the Order of First National Bank of
Arizona, Head Office, Phoenix 340, Daniels Jewelry
Company.

Mr. Baker: Here is another check to Jack Zane.
Do you know what that was for?

A. No.

Q. Huh? A. No.

Q. That is payable to your husband in the sum
of \$45.00, is it? A. Yes.

Mr. Baker: We offer this in evidence, a check
dated March 6, 1944, to Jack Zane, \$45.00. That
is while you were still in the Indio—no, that was
after you returned, excuse me.

(Thereupon the document was received as
Defendant's Exhibit Z in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT Z

Phoenix, Arizona, Mar. 6, 1944

No. 22

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of ArizonaPay to the Order of Jack Zane - - - \$45.00
Forty-Five and no/00 - - - - Dollars
ZOA ZANE[Endorsed on back]: Jack Zane.

Mr. Baker: Here is another check on Daniel's in the sum of \$63.00. Do you know what that is?

A. No, I don't recall.

Q. Dated August 9th, 1944. That is the date, isn't it (showing document to witness)?

A. Yes.

Q. And that is the Daniel's store down here at Phoenix? A. Yes.

Mr. Baker: We offer that in evidence.

(The document was received and marked Defendant's Exhibit AB in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT AB

Phoenix, Arizona, Aug. 9, 1944

No. 4

91-1 Head Office 91-1

Washington at First Avenue
First National Bank of ArizonaPay to the Order of Daniels - - - - \$63.00
Sixty-three and no/00 - - - - Dollars
ZOA ZANE

[Stamped on back of check:]

Pay to the Order of First National Bank of Arizona, Head Office, Phoenix 340, Daniels Jewelry Company.

Mr. Baker: Here is a check payable to C. P. Stephens in the sum of \$259.63. Do you know that check?

A. Yes, I sold the LaSalle and bought a Ford from him.

Q. So that is still another car involved?

A. Yes, but I sold the LaSalle before I bought this.

Q. That was the difference you paid?

A. No, that was what I paid.

Q. For the Ford? A. Yes.

Q. Well, you sold the LaSalle and then bought the Ford, is that what you did? A. Yes.

Mr. Baker: We offer this in evidence. [238]

(The document was received and marked as Defendant's Exhibit AC in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT AC

Phoenix, Arizona, Aug. 17, 1944

No. 4

91-1 Head Office 91-1

Washington at First Avenue

First National Bank of Arizona

Pay to the Order of C. P. Stephens - - \$259.36
Two Hundred, Fifty-nine and 36/00 - - Dollars
ZOA ZANE

[Stamped on back of check:]

Pay to the Order of the Valley National Bank,
Phoenix, Arizona, for Deposit to the Credit of
C. P. Stephens.

Mr. Baker: Here is E. M. Ramirez.

A. He put a top on the Ford for me.

Q. You handed me statements. I assume you have examined them, have you, the bank statements?

A. Yes. I don't think that is quite all of them, but I didn't have time last night to hunt around for all of them.

Q. They seem to be fairly complete; one or two missing. A. Yes.

Q. But you have examined them and that fairly and accurately portrays your bank account, does it, from the time you came back from Indio up to this date?

A. Yes, the first one and the last statement.

(Testimony of Zoa H. Zane.)

Mr. Baker: We offer these in evidence.

Mr. Carson: I think they are wholly incompetent, a whole bunch of bank statements, because a man who is working, evidently he is working and puts a part of the money he makes in the account and it is carried over a period of time, why, even after the suit is filed. It is immaterial to put all of that stuff in. It should [239] not have any probative effect.

Mr. Baker: I think it has a very definite probative effect, because you didn't object to me interrogating the witness until they were offered in evidence. I will show you whether they have probative effect or not.

The Court: Well, they may be received, they may be received.

(The documents were received as Defendant's Exhibit AD in evidence.)

(Testimony of Zoa H. Zane.)

DEFENDANT'S EXHIBIT AD

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Ariz.

Statement of Account with
 (MRS.) ZOA ZANE
 1921 E. Portland, Phoenix, Ariz.

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
			13,896.65
Mar 22 '43	13,896.65	25.00—	
Mar 23 '43	13,871.65	25.00—	
Mar 24 '43	13,946.65	35.00—	
Mar 27 '43	13,811.65	13.50—	
			Balance 13,798.15

Vouchers Returned: 4

Count Verified by: C

Please examine this statement at once. If no error is reported in ten days the account will be considered correct. All items are credited subject to final payment.

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1921 E. Portland, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Apr 6 '43	13,798.15	55.00—	
Apr 14 '43	13,743.15	1,900.00—	
Apr 26 '43	11,843.15	10.00—	
[Figures in longhand] :			
	33		
	833.15		
	35.25		
	<hr/> 11,797.90		
1,797.90	Zoa Zane		
Zoa Zane	140		
	275		14,500.00
		<hr/> Balance	11,833.15
	[Figures in pencil] :	2,666.85	
		1,875	
		<hr/> 791.85	

HEAD OFFICE
FIRST NATIONAL BANK OF ARIZONA
PHOENIX, ARIZONA

**STATEMENT OF
ACCOUNT WITH**

Zoa Zane
1921 E. Portland
Phoenix, Arizona

BALANCE | 11,737.5

VOUCHER RETURNED

COUNT VERIFIED BY:

JOURNAL

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1921 E. Portland, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Jun 8 '43	11,737.90	15.00—	
Jun 21 '43	11,722.90	28.00—	
Jun 22 '43	11,694.90	5.00—	
Jun 23 '43	11,689.90	10.50—	
			Balance 11,679.40

Vouchers Returned: 4

Count Verified by: ✓

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1617 W. Van Buren, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Jul 7 '43	11,679.40	14.26— 20.00—	
Jul 8 '43	11,645.14		69.17
Jul 12 '43	11,714.31	15.00—	
Jul 13 '43	11,699.31	16.00—	
Jul 13 '43	11,683.31	10.00— 80.00	54.61
Jul 14 '43	11,647.92	10.00— 10.00—	
Jul 15 '43	11,627.90	10.00 —	
Jul 20 '43	11,617.92	25.00— 110.00	
Jul 20 '43	11,592.92		

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Jul 20 '43	11,592.92	45.72
Jul 24 '43	11,638.64	25.00—
Jul 26 '43	11,613.64	20.00—
Jul 26 '43	11,593.64	61.50
Jul 27 '43	11,633.14	20.00—
Jul 30 '43	11,635.14	10.00—
	————	————
	* 175.26	* 231.00
	110	
	————	————
	285.26	
		————
		Balance 11,625.14

Vouchers Returned: 14

Count Verified by: J

* Figures in longhand.

[Figures in longhand, reverse side of Statement] :

2
80
10
20
25
20
25
10
10
10
14.26
20
15
16
10
————
285.26
231.00
————
54.26

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office
 FIRST NATIONAL BANK OF ARIZONA
 Phoenix, Arizona

Statement of Account with

ZOA ZANE
 1702 W. Tonto, City MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Aug 2 '43	11,625.14	25.00—	
Aug 2 '43	11,600.14	650.00—	
Aug 3 '43	10,950.14	4,300.00—	
Aug 4 '43	6,650.14	10.00—	
Aug 9 '43	6,640.14	68.70—	
Aug 10 '43	6,571.44	15.00— 20.70— 30.00—	
Aug 10 '43	6,505.74	25.00—	
Aug 13 '43	6,480.74	318.75—	
Aug 14 '43	6,161.99	850.00—	
Aug 16 '43	5,311.99	48.25— 20.00—	
Aug 17 '43	5,243.74	53.35— 20.00—	
Aug 19 '43	5,170.39	10.00— 5.00—	
Aug 21 '43	5,155.39	10.00—	11625.14*
Aug 23 '43	5,145.39	1.83— 4.55—	5044.08*
Aug 23 '43	5,139.01	8.51—	_____
Aug 25 '43	5,130.50	15.00—	6581.06'
Aug 26 '43	5,115.50	15.00—	4950. * _____
Aug 27 '43	5,100.50	30.00—	_____
Aug 27 '43	5,070.50	26.42—	1631.06*
			Balance 5,044.08

Vouchers Returned: 25

Count Verified by: J

* Figures in longhand.

[Figures in longhand, reverse side of Statement]

400.	5044.08	14500.
5.	515.	5429.08
10.	_____	_____
100.	4529.08	2970.92
_____		5000.
515.		4970.92

HEAD OFFICE
FIRST NATIONAL BANK OF ARIZONA
 PHOENIX, ARIZONA

STATEMENT OF
 ACCOUNT WITH

Zea Zane
 1722 W. Tente St.
 Phoenix, Arizona

DATE	OLD BALANCE	CHECKS LISTED IN ORDER OF PAYMENT—READ ACROSS	DEPOSITS
SEP 28 '43	3,407.465	15.00—	
SEP 29 '43	3,392.46	40.00—	41.75
SEP 30 '43	3,394.22	15.00— 29.8— 50 44.85 34 07.46 — 1636.16 2. 16 05 — 50 44.08 3376.24 — 1667.84 1605.95 — 61.89	61.50 28.4 61.50 203.1 16 05.95 203. — 16 — BALANCE
	1505.95		3,376.2
	14.40		
	4.81		
	4.50		
	1.66		
	106.66		
	106.66		
	3376.24		
	106.05		
	106.05		
	3370.19		
		VOUCHERS RETURNED	1
		COUNT VERIFIED BY	

PLEASE EXAMINE THIS STATEMENT AT ONCE. IF NO ERROR IS REPORTED IN TEN DAYS THE ACCOUNT
 WILL BE CONSIDERED CORRECT. ALL ITEMS ARE CREDITED SUBJECT TO FINAL PAYMENT.

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across		Deposits
Sep 1 '43	5,044.08	100.00—		
Sep 3 '43	4,944.08	400.00—		
Sep 4 '43	4,544.08	10.00—		
Sep 7 '43	4,534.08			61.50
Sep 8 '43	4,595.58	25.00—	5.00—	
Sep 9 '43	4,565.58	.88—		
Sep 9 '43	4,564.70	10.00—		
Sep 10 '43	4,554.70	35.00—		
Sep 12 '43	4,519.70	35.00—		
Sep 14 '43	4,484.70	15.00—	15.00—	
Sep 15 '43	4,454.70			38.40
Sep 17 '43	4,493.10	25.00—	5.00—	975.00—
Sep 20 '43	3,488.10	10.00—		
Sep 20 '43	3,478.10	2.00—		
Sep 22 '43	3,476.10	87.00—		61.50
Sep 23 '43	3,450.60	15.00—	10.00—	
Sep 23 '43	3,425.60	9.19—		
Sep 25 '43	3,416.41	8.95—		
			Balance	3,407.46

Vouchers Returned: 21

Count Verified by: PM

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Oct 1 '43	3,376.24	12.25—	
Oct 2 '43	3,363.99	50.00—	
Oct 4 '43	3,313.99	14.40—	
Oct 7 '43	3,299.59	10.00—	
Oct 10 '43	3,289.59	1.66—	
Oct 13 '43	3,287.93	200.00—	
Oct 20 '43	3,087.93	25.00—	
Oct 23 '43	3,062.93	135.10—	
Oct 29 '43	2,927.83	20.00—	1.98—
			Balance 2,905.85

Vouchers Returned: 10

Count Verified by: C

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Nov 1 '43	2,905.85	45.00—	
Nov 1 '43	2,860.85		35.00
Nov 1 '43	2,895.85		56.07
Nov 2 '43	2,951.92	7.41—	

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Nov 3 '43	2,944.51	19.00—
Nov 4 '43	2,925.51	200.00—
Nov 6 '43	2,725.51	11.01—
Nov 10 '43	2,714.50	7.32—
Nov 19 '43	2,707.18	1.77—
Nov 20 '43	2,705.41	35.00—
Nov 22 '43	2,670.41	12.50—
Nov 22 '43	2,657.91	300.00—
Nov 24 '43	2,357.91	14.71—
Nov 24 '43	2,343.20	15.00— 45.00—
Nov 27 '43	2,283.20	35.00
Nov 29 '43	2,318.20	13.53—
Nov 30 '43	2,304.67	21.00— 10.00—
Nov 30 '43	2,273.67	24.74
		—————
	[Figures in longhand] :	150.11
	Balance	2,298.41

Vouchers Returned: 16

Count Verified by: J

Head Office

FIRST NATIONAL BANK OF ARIZONA
Phoenix, Arizona

Statement of Account with	[Figures in longhand] :
ZOA ZANE	381.73
1722 W. Tonto	172.31
Phoenix, Arizona	—————
	209.42

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Dec 1 '43	2,298.41	23.79—	
Dec 1 '43	2,274.62	3.60—	
Dec 3 '43	2,271.02	50.00—	
Dec 4 '43	2,221.02	50.00—	
Dec 10 '43	2,171.02	40.00— 11.60—	

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Dec 11 '43	2,119.42	38.29—	
Dec 14 '43	2,081.13	40.50—	
Dec 15 '43	2,040.63	3.41—	
Dec 16 '43	2,087.22	55.00—	
Dec 17 '43	1,982.22	5.50—	
Dec 18 '43	1,976.72		36.32
Dec 20 '43	2,013.04	15.00—	
Dec 23 '43	1,998.04	12.50—	
Dec 27 '43	1,985.54	15.00—	40.27
Dec 28 '43	2,010.81	49.56—	
Dec 29 '43	1,961.25	3.65—	
Dec 30 '43	1,957.60	10.87—	
Dec 30 '43	1,946.73		35.00

		Balance 1,981.73	
		[Figures in longhand] : 1 6	_____
			381.73

Vouchers Returned: 17

Count Verified by: J

[Figures in longhand, reverse side of Statement] :

750		1981.73
18		93
30		_____
250		1888.73
35,		200
_____		_____
93.00		1688.73
		1888
		1650.

		238

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

State of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Feb 1 '44	220.10	43.48—	
Feb 2 '44	176.62		12.00
Feb 3 '44	188.62		35.00
Feb 5 '44	223.62		1,000.00
Feb 7 '44	1,223.62	107.50—	
Feb 9 '44	1,116.12	1.66—	
Feb 9 '44	1,114.46	1.77—	
Feb 10 '44	1,112.69	11.21—	
Feb 11 '44	1,101.48	10.00—	20.00—
Feb 12 '44	1,071.48	10.00—	
Feb 16 '44	1,061.48	40.00—	
Feb 17 '44	1,021.48		
Feb 17 '44	1,021.48	25.00—	
Feb 21 '44	996.48	15.00—	
Feb 23 '44	981.48	12.09—	5.00—
Feb 24 '44	964.39	10.00—	
Feb 26 '44	954.39	25.00—	
Feb 28 '44	929.39	25.00—	
Feb 29 '44	904.39	10.00—	
			Balance 894.39

Vouchers Returned: 17

Count Verified by: B

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office
 FIRST NATIONAL BANK OF ARIZONA
 Phoenix, Arizona

Statement of Account with

ZOA ZANE
 1722 W. Tonto, Phoenix, Arizona MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across		Deposits
Mar 1 '44	894.39	25.00—		
Mar 1 '44	869.39	2.75—	11.63—	
Mar 2 '44	855.01			35.00
Mar 7 '44	890.01	25.00—		
Mar 7 '44	865.01	45.00—		
Mar 9 '44	820.01	30.00—		
Mar 16 '44	790.01	25.00—		
Mar 16 '44	765.01	1.87—		
Mar 17 '44	763.14	13.52—		
Mar 18 '44	749.62	11.01—		
Mar 20 '44	738.61	25.00—		
Mar 20 '44	713.61	25.00—		
Mar 24 '44	688.61	35.74—		
Mar 27 '44	652.87	30.00—		
Mar 29 '44	622.87	11.02—	2.22—	15.00—
Mar 30 '44	594.63			100.00
Mar 31 '44	694.63	10.00—		
		344.76*		
	894.36*			
	684.63*			
	209.73*			
	135. *			
	344.73*			
			Balance	684.63

Vouchers Returned: 18

Count Verified by: W

* Figures in longhand.

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Jun 3 '44	331.84		35.00
Jun 7 '44	366.84		100.00
Jun 8 '44	466.84	25.00—	
Jun 12 '44	441.84	2.29—	
Jun 13 '44	439.55	40.00—	
Jun 14 '44	399.55	1.66—	
Jun 17 '44	397.89	7.58—	
Jun 26 '44	390.31	30.00—	
Jun 29 '44	360.31	5.81—	
			Balance 354.50

Vouchers Returned: 7

Count Verified by: C

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Jul 1 '44	354.50	21.11—	
Jul 10 '44	333.39	25.00—	
Jul 10 '44	308.39		35.00
Jul 24 '44	343.39	53.35—	
Jul 29 '44	290.04	20.00—	
			Balance 270.04

Vouchers Returned: 4

Count Verified by: C

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office
 FIRST NATIONAL BANK OF ARIZONA
 Phoenix, Arizona

Statement of Account with

ZOA ZANE
 1722 W. Tonto, Phoenix, Arizona MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Aug 1 '44	270.04	9.46—	
Aug 2 '44	260.58	25.00—	
Aug 5 '44	235.58		106.45
Aug 8 '44	342.03	3.39—	
Aug 11 '44	338.64	63.00—	400.00
Aug 19 '44	675.64	259.36—	
Aug 22 '44	416.28	30.00—	
Aug 31 '44	386.28	65.00 6.78—	
	509*		
	776.49*		506.45*
	314.50*		
	461.99*		
		Balance 314.50	

Vouchers Returned: 8

Count Verified by: C

* Figures in longhand.

[Figures in longhand, reverse side of Statement]

1.8

46.78
 65.
 230.
 259.36
 63.
 3.39
 9.46
 25
 461.99

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Sep 1 '44	314.50	6.07—	
Sep 4 '44	308.43	25.00—	
Sep 4 '44	283.43		35.00
Sep 7 '44	318.43	4.75—	100.00
Sep 12 '44	413.68	23.31—	
Sep 13 '44	390.37	5.07—	
Sep 15 '44	385.30	25.00—	
Sep 18 '44	360.30	10.00—	
Sep 19 '44	350.30	35.00—	
Sep 25 '44	315.30	1.98—	
Sep 27 '44	313.32	35.00—	8.73—
Sep 29 '44	269.59	13.88—	
		—	
		3*	
			Balance 255.71

Vouchers Returned: 12

[Figures in longhand, front
of Statement]:

314.50

255.71

—

59.79

135.

—

194.79

—

2

18

16

7

—

41

Count Verified by: C

[Figures in longhand, reverse
side of Statement]:

3 3

51.98

35.

25

10.

12

25.

—

5.07

37

23.31

4.75

25

25.

28

6.0718

—

35.

53

8.23

13.88

193.79

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA
Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Ariz.

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Oct 2 '44	255.71	20.00—	
Oct 3 '44	233.71		39.00
Oct 5 '44	274.71		100.00
Oct 7 '44	374.71	20.00—	
Oct 7 '44	354.71	60.00—	
Oct 13 '44	294.71	4.27—	
Oct 18 '44	290.64	30.20—	
Oct 23 '44	260.64	3.00—	
Oct 24 '44	332.64	60.00—	
Oct 25 '44	232.64		
Oct 26 '44	257.64	25.00—	100.00
Oct 27 '44	272.64	7.54—	
Oct 31 '44	265.10	11.03—	
			Balance 254.07

Vouchers Returned: 10

Count Verified by: T

[Figures in longhand, front
of Statement] :[Figures in longhand, reverse
side of Statement] :

255.71	11.03
254.07	7.54
—	20.
1.64	60.
	20.
	4.07
240.64	30.
120	3
—	25.
120.64	60.
	—
	240.64

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

4

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Nov 6 '44	254.07		100.00
Nov 9 '44	354.07	2.12—	
Nov 15 '44	351.95	4.27—	
Nov 18 '44	347.68	40.00—	
Nov 20 '44	307.68	26.95—	
Nov 25 '44	280.73	25.00—	
Nov 29 '44	255.73	8.61—	9.11—
Nov 30 '44	238.01	30.00—	
			Balance 208.01

Vouchers Returned: 8

Count Verified by: C

[Figures in longhand, front of Statement]:

21

34.27

212

30.00

40

26.95

25.

254.07

8.61

208.01

9.11

—

46.06

146.06

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Dec 5 '44	208.01	50.00—	
Dec 6 '44	158.01	3.41—	
Dec 6 '44	154.60		100.00
Dec 8 '44	254.60	1.77—	
Dec 9 '44	252.83	28.06—	
Dec 15 '44	224.77	25.00—	
Dec 21 '44	199.77	5.50—	
Dec 22 '44	194.27	25.00—	
Dec 28 '44	169.27	20.00—	
			Balance 149.27

Vouchers Returned: 8

Count Verified by: C

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Jan 4 '45	149.27	20.00—	
Jan 6 '45	129.27	8.88—	
Jan 6 '45	127.27	8.88—	
Jan 8 '45	120.39	1.77—	
Jan 8 '45	118.62	7.34—	
Jan 10 '45	111.28	20.00—	
Jan 16 '45	91.28	73.15—	
Jan 20 '45	18.13	4.63—	
Jan 31 '45	13.50		176.50
			Balance 190.00

Vouchers Returned: 7

Count Verified by: C

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Feb 1 '45	190.00	26.42—	
Feb 3 '45	163.58	15.00—	4.44
Feb 6 '45	144.14	70.00—	
Feb 6 '45	74.14		100.00
Feb 17 '45	174.14	150.00—	760.00
Feb 27 '45	784.14	25.00—	
Feb 28 '45	759.14	11.91—	
Feb 8 '45			Balance 747.23

[Figures in longhand] : 7
 \$767.06
 3-17-45

Vouchers Returned: 7

Count Verified by: C

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Feb 8 '45			
Mar 1 '45	747.23	1.66—	
Mar 6 '45	745.57		100.00
Mar 7 '45	845.57	30.00—	
Mar 7 '45	815.57	30.00— 8.38— 1.77—	
Mar 8 '45	775.42		100.00
Mar 13 '45	875.42	30.00—	
Mar 14 '45	845.42	29.00—	
Mar 19 '45	816.42	30.00—	
Mar 24 '44	786.42	10.30—	
Mar 26 '45	776.12	30.00—	
Mar 28 '45	746.12	21.00—	
Mar 28 '45	725.12	10.60—	
Mar 30 '45	714.52	5.00—	
Mar 31 '45	709.52	32.66—	
[Figures in longhand] :			747.23
Balance			676.86
[Figures in longhand] :			60.37

Vouchers Returned: 14

Count Verified by: B

(Testimony of Zoa H. Zane.)

Defendant's Exhibit AD—(Continued)

Head Office

FIRST NATIONAL BANK OF ARIZONA

Phoenix, Arizona

Statement of Account with

ZOA ZANE

1722 W. Tonto, Phoenix, Arizona

MM

Date	Old Balance	Checks—Listed in Order of Payment—Read Across	Deposits
Apr 2 '45	676.86	14.28—	
Apr 2 '45	662.58	45.00—	
Apr 3 '45	617.58	7.67—	60.43
Apr 13 '45	670.34	1.77—	
Apr 19 '45	668.57	6.00—	
Apr 23 '45	662.57		46.41
Apr 24 '45	708.98	30.00—	
Apr 24 '45	678.98	9.97—	
Apr 25 '45	669.01	385.00—	25.00—
			Balance 259.01

Vouchers Returned: 9

Count Verified by: C

The Court: We will now have a recess, gentlemen.

(Thereupon a short recess was taken.)

After recess, all parties as heretofore noted by the Clerk's records being present, the trial resumed as follows:

(Testimony of Zoa H. Zane.)

Zoa H. Zane resumed the witness stand and testified further as follows:

Re-cross Examination—(Resumed)

Mr. Baker:

Q. Now, Mrs. Zane, about that \$400.00 loan that you made to that lady, has that ever been repaid?

A. Yes.

Q. How was it repaid? [240]

A. \$35.00 a month.

Q. At the rate of \$35.00 a month?

A. Yes.

Q. I noticed some \$35.00 deposits so that probably indicates the re-payment of that loan?

A. Yes.

Q. I hand you a statement from the bank, being a part of Defendant's Exhibit AD, for the month of March, 1943. The first entry I find thereon is a balance of \$13,896.65. That was your original deposit after you returned from Indio in the bank?

A. Yes.

Q. Here in Phoenix? A. Yes.

Q. That was made soon after you returned, is that correct?

A. Well, I had evidently been in town about two weeks before I deposited the check.

Q. I believe you testified, and so did Dr. Lytton-Smith, that you first was examined by him in December, 1943, and had an operation in October, 1943, is that correct? A. Yes.

(Testimony of Zoa H. Zane.)

Q. And it was soon thereafter that your husband telephoned Dr. Blackman, you knew of that, [241] didn't you? A. No, not immediately.

Q. I am handing you a bank statement which is a part of Defendant's Exhibit AD in evidence, this bank statement being for October, 1943, and will ask you to examine the same. That bank balance of \$2,400.00 credit, that what you had at that time? A. Yes, I suppose it was.

Q. This suit was brought against the Pacific Greyhound Line, it was brought in December, 1944?

A. Yes.

Q. You were familiar when it was filed, were you not? A. Yes.

Q. I hand you your bank statement for December, 1944, this being a part of Defendant's Exhibit AD. I will ask you to look at the same. That bank balance credit is in the sum of \$149 67?

A. Yes.

Q. That is what you had in the bank at that time? A. Evidently.

Q. In one of these—I believe you testified in response to a question by Mr. Stahl, that you and your husband had no source of income and no [242] property, income producing property other than your husband's earnings, is that correct?

A. Yes.

Q. I will ask you if you remember of ever going through that—these have been mixed up. I had them all separated out during the noon hour, I will have to go through them and—maybe you will

(Testimony of Zoa H. Zane.)

remember it, of a deposit in the sum of \$1,000.00 being made during this course of time, do you remember that?

A. I suppose that is when I had to cash the bonds.

Q. You assume that is true, you did cash a bond? A. Yes, I suppose it was.

Q. And there is another deposit there in the sum of \$760.00. Do you remember that?

A. That sounds like another bond.

Q. The chances are you have cashed all of your bonds?

A. No, I haven't. I have at least two.

Q. You have at least two? A. Yes.

Mr. Baker: I think that is all. [243]

Re-direct Examination

Mr. Stahl:

Q. Mrs. Zane, when did you first learn or find out about the injury to your right femur, thigh-bone, hip?

Mr. Baker: We object to that as not proper re-direct examination, has been gone into fully in his direct examination.

Mr. Stahl: I don't know for sure whether she answered it or not.

The Court: I am sure she answered that question. You may answer it again.

A. It was toward the latter part of August in 1943.

(Testimony of Zoa H. Zane.)

Mr. Stahl: And was that when you went to Dr. Smith, Lytton-Smith?

A. I went to Dr. Ryerson first and he sent me to Dr. Lytton-Smith.

Q. Was that in August or September?

A. Well, it was September before I got to see Dr. Lytton-Smith.

Q. When did you see Dr. Ryerson?

A. It had been a few days after the X-rays were taken. I think it took four or five days before the X-rays were done.

Q. Do you mean, Dr. Ryerson? [244]

A. Yes.

Q. Those X-rays, do you know when they were taken?

A. It was the last part of August, but I think it was the first of September, or something like that, before they were sent to Dr. Ryerson.

Q. And Mr. Baker asked you when you filed your suit. Will you state when you first found out as to your right to bring suit or you knew anything about that?

Mr. Baker: We will object to that, if the Court please.

Mr. Carson: It becomes very material, your Honor.

The Court: Well, why?

Mr. Carson: Because, it becomes very material on this question, on the question of tender, for one thing, if she has the right to make tender on the

(Testimony of Zoa H. Zane.)

question of whether she had saved her money, or something like that.

The Court: Well, I don't know. Ask when she determined to file a law suit, not whether she had the right to file a law suit. Maybe she had the right to file, I don't know.

Mr. Stahl: When did you determine you would file suit? [245]

A. I think it was in August, 1944.

Q. Out of the money you received, Mrs. Zane, from this settlement, how much was it you paid for the artificial limb out of this money?

A. I paid \$275.00 when I got it and then I paid twenty-five to have it re-built.

Q. And that was paid to the Los Angeles outfit?

A. The \$275.00 was. \$25.00 was paid to the Arizona Brace Shop here in town.

Q. Did you expend any other money to the Arizona Brace Shop?

A. Oh, there was for shrinker and crutch pads and tips, and such as that.

Q. All of that was at what time, about what time were those expenditures?

A. Oh, I don't know. They have been over a period of time.

Q. During what—

A. (Interrupting): The shrinker, I bought right after I came back from Indio.

Q. How was that?

A. I say, the shrinker for my stump I bought right after I came back from Indio.

(Testimony of Zoa H. Zane.)

Q. That is what I mean, it was during the spring or summer of 1943? [246] A. Yes.

Mr. Stahl: Mark this.

(The document was marked as Plaintiffs' Exhibit 12 in evidence.)

Q. Here is what purports to be a receipt, Plaintiffs' Exhibit 12 for identification, for \$25.00. Is that connected with that brace shop?

A. Yes, that was a deposit. They never did finish re-building the leg.

Q. You gave them a check for that?

A. Yes.

Mr. Stahl: I will offer that.

Mr. Baker: May I see it, please?

Mr. Stahl: That is a receipt for \$25.00. (Handing the document to Mr. Baker.)

Mr. Baker: I have no objection to this.

(The document was received and marked as Plaintiffs' Exhibit 12 in evidence.)

PLAINTIFFS' EXHIBIT NO. 12

July 23, 1943.

Received of Zoa Zane Twenty-five and no/00 Dollars.

Deposit.

\$25.00.

AUNGER ARIZONA BRACE
SHOP—C. B.

(Testimony of Zoa H. Zane.)

Mr. Stahl: Now, I believe you testified, Mrs. Zane, that when you deposited the fourteen thousand, five hundred in the bank over there at Indio—

A. Yes.

Q. And then you drew some checks against that? A. Yes. [247]

Q. And what were those checks for, in general?

A. Well, they were for the hospital there in Indio and for that artificial limb.

Q. And now in reference to the cars, you purchased the La Salle, I believe, on August 13th, or thereabouts, 1943? A. Yes.

Q. And how long did you keep that?

A. For about a year.

Q. And then what did you do with it?

A. I sold it.

Q. And did you purchase another car in place of it? A. Yes, a Ford.

Q. And what Ford car did you purchase, or were there any other cars purchased by you or your husband?

A. Yes. When Jack came home from the Navy, why, he needed a car to drive to work so he got him a car.

Q. Now, in these statements there appears some deposits from time to time, and I believe among them you said a part of it was a re-payment on the loan and then there are some other deposits on there. What, in general, are those?

A. Well, during the time that Jack—before

(Testimony of Zoa H. Zane.)

[248] he went to the Navy and since he has gotten out, most of them that appears is his checks I have sent him and deposited, and during the time he was in, why, the \$100.00 deposits, that is what the Navy sent me, and then, too, there was his \$300.00 mustering out pay was deposited.

Q. What?

A. Jack's mustering out pay was deposited to that account.

Mr. Stahl: I think outside of covering some questions I have overlooked, or I think I have, I will probably encroach. This is not re-direct. I want to be sure that I have covered these things.

Q. You testified, I believe, Mrs. Zane, in your direct examination—I may have asked you this before—about a conversation you had at the hospital during the time you were there with Dr.—with Mr. Cameron and Dr. Blackman. They were both present in your room in which certain things were discussed. I believe that is the only conversation you testified to when they were both present. I want to see whether or not you can fix the approximate date of that conversation. I may have asked that.

A. Well, they were in the room one time they were discussing the artificial limbs and the [249] people they knew.

Q. Yes, when was that?

A. Oh, it was probably about the middle of January.

Q. 1943? A. Yes.

(Testimony of Zoa H. Zane.)

Q. That is as close as you can fix that?

A. Yes.

Q. And then there was—at the time of these different conversations, you testified to various conversations you had with Dr.—with Mr. Cameron and Dr. Blackman regarding the extent of your injuries, and so forth. Do you recall when, approximately, the first such conversation was that you had with Dr. Blackman?

A. Well, it was probably within a week or so after I had entered the hospital I had asked him about it.

Q. And about—I think you have already stated the substance of that conversation in your previous testimony, so I won't go into that again, but the conversation you had, the first conversation you had with Mr. Cameron, about when was that regarding the extent of your injuries?

Mr. Baker: What was that question?

(The question was read by the Reporter.)

A. Well, I imagine it was after Dr. Blackman had told me that there wasn't anything the matter with me except the loss of my leg.

Mr. Stahl: About when was that?

A. Well, possibly a week, or something like that, after I talked to Dr. Blackman about it.

Q. About what?

A. About a week after.

Q. About a week after the first conversation you had with Dr. Blackman? A. Yes.

Q. Now, as to the matter of pain in your upper

(Testimony of Zoa H. Zane.)

leg and hip and knee, I believe you stated—described what that pain was, that you did have pains there almost from the beginning, from the time you entered the hospital? A. Yes, sir.

Q. And what was the nature of it?

Mr. Baker: Oh, we object to that.

Mr. Stahl: I guess it has been gone into.

Mr. Baker: Repetition.

Mr. Stahl: Will you state whether or not anything was said about that to Dr. Blackman?

A. Yes, I told the doctor about it.

Q. If so, when?

A. He said it was probably a reaction from [251] the amputation.

Q. And, if so, when was that?

A. Well, it was probably the first or second time that they dressed my leg.

Q. That was the first time you talked to him?

A. Yes.

Mr. Stahl: I believe that is all.

Mr. Baker: No further questions.

(The witness was excused.)

Mr. Stahl: Now, if the Court please, we plead in our complaint the statute of California. I believe you will admit—in our complaint, we plead the statute of California, Paragraph 1542. We want to offer that statute and ask you if you will stipulate that that statute, they had that statute in California at the time.

Mr. Baker: Oh, you mean that Section 1542?

Mr. Stahl: Yes.

Mr. Baker: What did I have in my Answer?

Mr. Stahl: You said you had no knowledge or information.

Mr. Baker: I was answering for the Pacific Greyhound Lines, and they don't.

Mr. Stahl: Will you stipulate as to that [252] statute?

Mr. Baker: You had it correctly cited in your complaint, certainly, that is true.

Mr. Stahl: Then it may be stipulated?

Mr. Baker: Yes, the one Section of the statute that you have cited is a part of the California code.

Mr. Stahl: And was at the time of this accident?

Mr. Baker: Yes.

Mr. Stahl: That is Paragraph 1542, which is quoted in the second or third count. Then, if the Court please, in connection with that we wish to introduce several California decisions construing that statute, and as I understand it, the cases are more a matter for the court than the jury, but I suppose we ought to introduce them by title and volumes—

Mr. Baker (Interrupting): What is this? I don't hear you, Floyd.

Mr. Stahl: We want to introduce several cases construing—

Mr. Baker (Interrupting): To read to the jury?

Mr. Stahl: No, not to read to the jury. Present them to the Court. [253]

Mr. Baker: They have no business in evidence, might be arguments before the Court?

Mr. Stahl: Arguments before the Court?

Mr. Baker: You will have the opportunity to present them.

Mr. Carson: As the California law—

The Court (Interrupting): All right, that is all right. Let's go ahead with this case. What do you want to do, rest?

Mr. Stahl: The only other thing besides that is the mortality table as to life expectancy.

Mr. Baker: Do you have it here?

Mr. Stahl: I don't have it here, it is in *Corpus Juris*.

Mr. Baker: Volume 40, if I recall.

Mr. Stahl: The page, I don't have.

Mr. Baker: I don't remember that. I think that is Volume 40. I will stipulate that is correct.

Mr. Stahl: It might show a person's expectancy, a person 23 years old might show—

Mr. Baker (Interrupting): Wait a minute, I don't know what it shows. I won't stipulate to that. I will stipulate it is in *Corpus Juris*, that is correct.

Mr. Carson: May we get that volume of [254] *Corpus Juris*.

The Court: Oh, yes, the stipulation covers that, there will never be any question about that.

Mr. Stahl: That, of course, would be a matter to be submitted to the Jury.

Mr. Baker: Does the Plaintiffs rest?

Mr. Stahl: Yes, the Plaintiffs rest.

Mr. Baker: The Defendants desire to make a motion and prefer to make it in the absence of the jury.

Mr. Stahl: Your Honor, do you expect to have court tomorrow?

The Court: I don't know yet, I will determine that later. Why?

Mr. Stahl: I thought if you didn't, why, we would like a little more time. There are a lot of involved questions on this line and it will take a long time and we have been so busy in the trial we would like to have a little time. If this goes over to Tuesday, I believe this motion should go over to Tuesday and we have been so very, very busy, and it is an involved and intricate thing, it will probably take two hours of argument.

The Court: The Court can take care of the time to argue it.

Mr. Stahl: I appreciate that. [255]

The Court: I will excuse you gentlemen until 10 o'clock in the morning. Keep in mind the Court's admonition.

(Thereupon the jury was excused from the Courtroom.)

Mr. Baker: The Defendant, at the close of the testimony for the Plaintiffs, now moves the Court to instruct the jury to return a verdict for the Defendant upon the grounds and for the reason that the Plaintiffs have failed to adduce testimony sufficient to constitute a cause of action against the Defendant.

The complaint is in three causes of action. Some of it is most repetitious. The second and third causes of action I have never been able to distin-

guish between the two. I don't know whether the Court has or not.

The Court: I was not able to.

Mr. Baker: They look identical to me. Of course, the first cause of action is different.

As a defense to all causes of action, we have interposed the defense of a written release, together with the vouchers which also contain releases. The complaint, as I view it, anticipated the defense, which was probably unnecessary, but as I understand the rule, if they do undertake to [256] anticipate it, then they assume all the burden of proof to carry out all of the allegations of their complaint.

First, they rely upon the California statute; secondly, they rely upon fraud. That is the way I analyze it. Is that the way the Court analyzes the situation? That is the way I analyze their complaint.

Now, first, in reference to the California statute which reads, as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

This is restricted to a general release. It does not cover a release that is specifically a release against known and unknown claims and expressly waives the provisions of this statute. The release in connection with this case provides as follows:

“It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected,

and all rights under Section 1542 of the Civil Code of California are hereby expressly [257] waived," that being the statute relied upon by the Plaintiffs in their complaint.

This matter has been before California, as far as I can find, three different times, before the Courts.

(Thereupon several citations were presented and argued before the Court by counsel for the Defendant.)

Mr. Baker: I submit, if the Court please, no cause of action has been proven in this case, either under the provisions of the Arizona Code, nor upon the ground of fraud.

(Further argument was presented to the Court after which a recess was taken at 4:45 P. M. of the same day.) [258]

10 o'clock A. M., May 19, 1945, all parties as heretofore noted by the Clerk's record as being present, the trial resumed as follows:

The Court: You gentlemen are excused until Monday afternoon at 2 o'clock. Keep in mind the Court's admonition.

(Thereupon the jury was excused from the courtroom.)

Mr. Stahl: If the Court please, I just want to say a few words.

(Thereupon arguments were presented by both Mr. Stahl and Mr. Carson, counsel for the Plaintiffs, after which the Court recessed at 11:05 o'clock A. M. of the same day.) [259]

2 o'clock P. M., May 21, 1945, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: The record may show that the Defendant's motion is denied. You may proceed.

Mr. Baker: Proceed with the Defendant's case, then?

The Court: Yes.

DEFENDANT'S CASE

MR. FRAZEE BURKE

was called as a witness on behalf of the Defendant, and after being first duly sworn, testified as follows:

Direct Examination

Mr. Baker:

Q. State your name, please.

A. Frazee Burke.

Q. Where is your residence, Mr. Burke?

A. Los Angeles, California.

Q. Do you know the corporation known as the Western Adjusting Bureau? A. I do.

Q. What is your connection with that corporation?

A. Well, I work for a concern, which, in turn, [260] owns that corporation. That concern is Swett & Crawford?

A. I am assistant manager of their Claims Department.

(Testimony of Mr. Frazee Burke.)

Q. That gives you automatically a position with the Western Adjusting Bureau, is that correct?

A. Yes.

Q. The Western Adjusting Bureau—you have seen the voucher—I will re-frame the question.

You have seen the vouchers that are in evidence in this case, have you, Mr. Burke?

A. Well, I have seen them in the back of the courtroom. I have not examined them. I have seen copies of them, carbon copies.

Mr. Carson: Mr. Baker, have you qualified this man? Is he an official of the Greyhound, is that right, or what duties—

Mr. Baker (Interrupting): May I do it in my own way, or do you want to do it?

Mr. Carson: Well, I don't want to do it.

Mr. Baker: Well, all right. I am handing you Defendant's Exhibits C and D in evidence, which are vouchers and checks drawn on the Western Adjusting Bureau by a man named Cameron. Is this company to which you are referring the same company which appears on these vouchers? [261]

A. You mean, the Western Adjusting Bureau?

Q. Yes. A. It is.

Q. Will you state your position with the Western Adjusting Bureau as assistant manager?

A. It would be the same as with Swett & Crawford.

Q. What is the connection, if any, between the Western Adjusting Bureau and the Pacific Greyhound Lines?

(Testimony of Mr. Frazee Burke.)

A. The Western Adjusting Bureau, as I say, are wholly a corporation owned by Swett & Crawford. Swett & Crawford have an agreement with the Pacific Greyhound Lines, under which agreement all claims by third persons against the Pacific Greyhound Lines on account of personal injuries are adjusted. In other words, we investigate and adjust their accidents as though we were their Claim Department.

Q. Does the Pacific Greyhound Lines maintain a Claim Department for the purpose of adjusting and investigating claims?

A. No, not personal injury claims.

Q. Under what conditions do you do that with the Pacific Greyhound Lines, for a compensation?

A. That is right.

Q. On what basis? [262]

Mr. Stahl: If the Court please, I don't know whether this witness is competent to testify about those things. There are undoubtedly agreements which are in writing between the two companies and they would be the best evidence. May I ask a few questions under voir dire?

The Court: Well, if that is material. This corporation is the one that signed the checks. I see that the corporation's name is signed to the vouchers.

The Witness: May I have the question?

(The question was read by the Reporter.)

A. They pay us on the mileage basis. We get a fee based on the miles operated by the Greyhound Lines each month.

(Testimony of Mr. Frazee Burke.)

Mr. Baker: I will ask you whether or not the Pacific Greyhound Lines is a self-insurer?

A. No.

Mr. Stahl: Well now, if the Court please, he says he is not an officer connected with the Pacific Greyhound Lines.

Mr. Baker: I will ask you first, do you know?

A. I do.

Q. Is it a self-insurer?

A. Up to a certain point. They carry a certain portion of their salaries on insurance, on [263] what is known as an Excess policy and what is, in turn, referred to as a Retention, a portion of the risk which they carry themselves.

Q. Which insurance does it pay, what they call the excess losses? A. Yes.

Mr. Stahl: I object on the ground it is incompetent, irrelevant and immaterial whether they are self-insurers or not.

The Court: I don't really see the purpose of it myself.

Mr. Baker: Simply to show the connection between the Western Adjusting Bureau and the Greyhound Lines.

Mr. Stahl: What is the difference what the connection is?

Mr. Baker: Well, I am trying to show that the Western Adjusting Bureau is not an independent contractor, that it was working for the Pacific Greyhound Lines in adjusting its claims. That is what I

(Testimony of Mr. Frazee Burke.)

am trying to show, and I will show you later that Cameron was its agent.

Q. Do you know this Mr. Cameron who executed these vouchers which I have just shown you?

A. I do.

Q. What are his initials, please? [264]

A. William C., I think it is, William. I always called him Bill. I have known him for years, always been Bill Cameron.

Q. Was he, in 1942, and at the time that these vouchers were executed, an agent for the Western Adjusting Bureau? A. He was.

Q. And for what purposes?

A. Investigation and adjustment of claims, and his work was confined to the Greyhound claims. We handle a great many other accounts, but his work was, to all intents and purposes, he was busy about their work and whatever we could have used him on, other matters, any time we desired.

Q. The Western Adjusting Bureau, as you say, handles many different accounts? A. Yes.

Q. In the adjusting line? A. Yes.

Q. And Cameron's work was mostly for the Greyhound Lines, is that correct? A. Yes.

Q. Is Cameron available for a witness in this case? A. He is not.

Q. Will you state why? [265]

A. Cameron became ill, I can't tell you the date, within the last year or approximately a year ago, and I don't know where he is now. The last I heard

(Testimony of Mr. Frazee Burke.)

of him he was in the Camarillo State Hospital north of Los Angeles a short distance.

Mr. Carson: There is a proper way to show that if that be true.

The Witness: I say that. I didn't see him in the hospital. It is my understanding and belief that that is the last—

Mr. Stahl (Interrupting): We make a motion to strike that, his understanding and belief.

Mr. Baker: He was an employee of the company up to the time he was taken ill, was he?

A. That is right.

Q. He is not an employee of the company now?

A. No.

Q. Do you know why he is not an employee of the company?

Mr. Stahl: Of your own knowledge?

A. Well, except for what I have observed personally about him before and at the time he left our employment, I am afraid I would be repeating hearsay if I told you what I know of his condition. For more than two or three months before he left our employ he became continuously [266] and obviously more unsettled mentally until such time that we just could not let him handle our claims any more. This condition came on, as I say, oh, some time around eight or ten months ago. The next I heard him, I was informed of his whereabouts and again didn't see him. I saw him subsequent to that and he told me where he had been.

(Testimony of Mr. Frazee Burke.)

Mr. Baker: Q. The trouble is mental, is it?

A. Yes. That, again, is my diagnosis.

Mr. Baker: And you have seen him lately?

A. Well, yes. He was in and out of this hospital and during the interval between those two periods when he was in the hospital I saw him.

Q. In your opinion is he mentally competent to be a witness?

A. I can answer it this way, by saying that we didn't regard him as being mentally competent to handle our work, and I don't think the man is right mentally. I don't know what the trouble is. He had a long—well, a typical experience of a man who fought all through the last war with the Canadian Army from start to finish—

Mr. Carson (Interrupting): We object to this stuff, your Honor. [267]

The Court: All right.

Mr. Baker: You ever know of a Dr. Blackman in Indio?

A. I know that such a man practices down there merely by reference to the files. I never saw him or talked to him in my life.

Q. Is he a physician for the Western Adjusting Bureau? A. He is not.

Mr. Carson: I object to it. It would not make any difference whether the Western Adjusting Bureau—it wouldn't make any difference whether he was or was not.

The Court: Well, I don't know.

(Testimony of Mr. Frazee Burke.)

Mr. Baker: Was he ever a physician or a doctor for the Western Adjusting Bureau?

A. No.

Q. Did Mr. Cameron have any authority to retain or hire a physician or a doctor either for the Western Adjusting Bureau or the Greyhound Lines?

Mr. Stahl: We object to that. He certainly can't testify as to the Greyhound.

Mr. Carson: Not an employee of the Greyhound.

The Court: I don't see how he can. [268]

Mr. Baker: In reference to the adjustment and the investigation of claims, did Mr. Cameron have any authority to hire or employ Dr. Blackman for the Western Adjusting Bureau or the Greyhound Lines?

Mr. Carson: We object to that.

Mr. Baker: That is proper.

The Court: All right, he may answer.

A. None.

Mr. Baker: Were you ever advised or was the Western Adjusting Bureau ever advised that Dr. Blackman was acting as the physician or surgeon for the Greyhound Lines or the Western Adjusting Bureau?

Mr. Stahl: If the Court please, we think it is immaterial whether he was advised or not. We object on the ground it is immaterial.

The Court: Yes.

Mr. Baker: Did Mr. Cameron ever advise you that he had retained Dr. Blackman?

(Testimony of Mr. Frazee Burke.)

Mr. Stahl: We object on the ground it is immaterial.

The Court: All right, he may answer.

A. No.

Mr. Carson: Your Honor, for the purpose of the record we make a motion to strike it. [269]

The Court: Oh, don't waste any time. I have heard your objection. The motion is denied.

Mr. Baker: That is all, you may cross examine.

Mr. Stahl: If the Court please, I don't think there is any cross examination. I do want to make a motion in one particular where he testified that Mr. Cameron had no authority. I think that calls for a conclusion of the witness as to whether he had authority or not. If it would be authority which the law would recognize, which would be a conclusion of law.

The Court: It is a statement on the facts, isn't it? He knew what Mr. Cameron's duties were, surely.

Mr. Stahl: Yes. Of course, it would be a question of law whether or not, in view of his duties, that we could necessarily follow; that is, a part of his apparent authority as a matter of law to—

Mr. Baker (Interrupting): Well, if there is any question about that I might ask a few more questions.

The Court: All right.

Mr. Baker: As assistant manager of the Western Adjusting Bureau, do you know the exact [270] duties and authority of Mr. Cameron as agent for the Western Adjusting Bureau? A. I do.

(Testimony of Mr. Frazee Burke.)

Q. Mr. Cameron was only an agent for the Pacific Greyhound Lines in that he was agent for the Western Adjusting Bureau, is that correct?

A. That is right.

Q. In other words, he never worked for the Pacific Greyhound Lines at any time, is that right?

A. Never, to my knowledge.

Q. Well, taking in 1942, at the time this claim was settled?

A. No, never during any period while I was acquainted with him, and that goes back for many years.

Q. He was never employed by the Pacific Greyhound Lines?

A. Never during my period of acquaintanceship with him.

Q. He was an employee of the Western Adjusting Bureau? A. He was.

Q. And his only relationship with the Pacific Greyhound Lines was through the Western Adjusting Bureau, is that right?

A. That is correct. [271]

Q. Now, what was his authority again? I believe you recited it once. Recite it again.

A. Well, the best way I can describe it is, that he was employed for the purpose of investigating accidents involving the equipment of the Pacific Greyhound Lines and which resulted in injuries to members of the public. By that I mean, injuries to people other than employees of the Greyhound Lines; passengers or others not connected with the

(Testimony of Mr. Frazee Burke.)

Greyhound Lines. In addition to investigating such affairs, he would, in certain instances, endeavor to bring about settlement of any claims which might arise because of such injuries. Some of the claims were settled, obviously, some were not. Some we desired to settle; some we didn't settle. Some got into litigation and could not settle them if we wanted to. It is the usual picture of a public carrier in their dealings with the injured public.

Q. He was authorized to investigate personal injuries to third persons and to negotiate for the settlement of claims?

A. That is correct. He had limited authority to settle claims without reference to the office. If the settlement involved money, the payment of money in excess of that authority, then he got [272] specific authority to settle all claims.

Q. What was the limit of the authority to settle without reference to the office?

A. My recollection is \$300.00.

Q. Everything over \$300.00 had to be approved, did it, by somebody else?

A. If he were out in the field in any emergency, he might draw a draft for any amount which his judgment warranted, and that draft would be accepted or rejected when it was presented for payment, depending upon whether or not, in the judgment of his superiors, the settlement was justified by the evidence. Normally, a settlement for \$300.00 or under would just be passed without any question.

Q. I will ask you whether or not the Western

(Testimony of Mr. Frazee Burke.)

Adjusting Bureau had any authority to represent the Pacific Greyhound Lines, save and except in the investigation and negotiation for the adjustment of personal injuries to third persons?

A. That is the extent of our authority. Our entire relationship looked only toward that end.

Q. I will ask you whether or not Mr. Cameron, as agent for the Western Adjusting Bureau, had any further authority than that recited?

A. None. [273]

Q. I will ask you whether or not Dr. Blackman, in Indio, had any authority whatever to negotiate for, and/or settle any claim against the Pacific Greyhound Lines?

Mr. Carson: We object to the question, your Honor.

Mr. Baker: If you know.

Mr. Stahl: He is not an officer or employed to settle the claims for the Pacific Greyhound Lines.

The Court: Objection sustained to that.

Mr. Baker: Did any person other than the Western Adjusting Bureau or its agents have any authority to negotiate for the settlement of any personal injury claim for third persons for the Pacific Greyhound Lines?

Mr. Stahl: We object to that, because, for the same reason, this man is not employed or connected with the Pacific Greyhound Lines.

Mr. Baker: If you know.

The Court: I will sustain the objection.

Mr. Baker: That is all.

(Testimony of Mr. Frazee Burke.)

Cross Examination

Mr. Stahl:

Q. Mr. Burke, as I understand it, you said [274] that the Western Adjusting Bureau, the work it does for the Pacific Greyhound Lines is on a mileage basis?

A. Our compensation is computed on the basis of the number of miles traveled by the Greyhound busses during each monthly period.

Q. And when you adjust claims for them, you do that through the man that you send down to investigate the accidents?

A. That is correct.

Q. And Mr. Cameron was one of these men?

A. He was.

Q. Just to make it clear, Mr. Burke, these drafts are drawn by the Western Adjusting Bureau on the Pacific Greyhound Lines?

A. That is right.

Q. And, of course, were paid by the Pacific Greyhound Lines? A. That is right.

Mr. Stahl: That is all.

Mr. Baker: Just one more question I forgot to ask you. May I be permitted to ask one question?

Mr. Carson: Yes, go ahead.

Re-Direct Examination

Mr. Baker:

Q. I am handing you Defendant's Exhibits [275] B and E, being the releases. I will ask you whether

(Testimony of Mr. Frazee Burke.)

or not those are the forms used by the Western Adjusting Bureau, you recognize the forms?

A. Yes, they are.

Q. Were they the same forms that were used during the year 1942 by the Western Adjusting Bureau? A. The same forms.

Q. And were any other forms used at that time?

A. For releases?

Q. Yes.

A. No. An adjuster might be out in the field and find himself without forms and he might draw a release in longhand in some isolated case, but if he were supplied with his regular equipment he would use that form of release, the only one that we have.

Mr. Baker: That is all.

Re-Cross Examination

Mr. Stahl:

Q. You wouldn't say, Mr. Burke, would you, that an agent like Mr. Cameron, an adjuster, would investigate a claim and find that somebody who has been injured in a Greyhound accident required medical attention, that he would have no right to [276] supply it; order to supply it?

A. You mean, on behalf of the Greyhound Lines?

Q. Yes.

A. No, he would have no such authority. Now, as a matter of first aid, it is a matter of policy to furnish first aid on all of these cases. I am volunteering you an opinion which you find, if you take a policy of insurance on your own automobile.

(Testimony of Mr. Frazee Burke.)

Mr. Carson: We object to it—

Mr. Stahl: (Interrupting) He can furnish first aid?

A. Well, he would not have occasion to unless he happened to be present at the happening of an accident through some coincidence. He would not be so associated with an injured person, or for first aid. He would have no occasion to be there. He would not come in contact with him until some appreciable period of time after the happening of an accident.

Mr. Stahl: That is all.

The Witness: I will say this, if I can go on and answer your question, that if, as a coincidence, he, or any of our other adjusters, whether it might be a man who normally, in the [277] course of his duties, handles Greyhound claims—we have a great many adjusters, we have many men handling claims, but if they were traveling down on the road in an automobile and they came upon the scene when it occurred and they could be of assistance in seeing that they get to doctors, so what they did was to send them to the nearest doctor regardless of who it might be. They would assist to that extent and they would not be criticized.

Mr. Baker: In other words, you would not criticize them for exercising the ordinary doctrine of humanity in taking care of people who had been injured?

A. No. I would criticize an adjuster if he saw a wreck of that kind, or if he knew of any other

(Testimony of Mr. Frazee Burke.)
person whose business we handled, if he closed his eyes and drove off.

Mr. Carson: That is all.

Mr. Baker: May Mr. Burke be excused? He wants to get back to Los Angeles.

The Court: Yes, he may be excused.

(Thereupon the witness was excused.)

Mr. Baker: Mr. Parks.

EARL F. PARKS

was called as a witness on [278] behalf of the Defendant, and being first duly sworn testified as follows:

Direct Examination

Mr. Baker:

- Q. Will you state your name, please?
- A. Earl F. Parks.
- Q. And where is your residence?
- A. At the present time, Phoenix, Arizona.
- Q. And what is your occupation?
- A. Superintendent of Operations for the Pacific Greyhound Lines.
- Q. In what district?
- A. At the present time known as Division 2 covering the territory between Albuquerque, New Mexico, El Paso, Texas, on the east; El Centro and Indio, California, on the west.
- Q. Your present authority does not go beyond Indio?

(Testimony of Earl F. Parks.)

A. That is correct, except on Highway 66, between Albuquerque and Los Angeles. It does extend through to Los Angeles on that portion of the operation.

Q. In December, 1942, what was your occupation?

A. I was Superintendent of Operations of the Pacific Greyhound Lines, headquarters at Los Angeles, covering the territory north of San Luis [279] Obispo and Fresno, California, to the south, to El Centro, Indio and San Diego, California.

Q. Did you know of an accident that occurred on your division, which was then the Los Angeles Division, as I understand it?

A. That is correct, that is Division 3.

Q. On December 11, 1942, in which Mrs. Zane was injured?

A. Yes. I was stopping at Palms Hotel in Palm Springs, California, the night of the 10th and they called me at approximately 5 o'clock in the morning and informed me of the accident, and I got over there as soon as I could get dressed and drive over to the scene of the accident.

Q. I understand that Indio, California, was under your jurisdiction at that time?

A. That is correct.

Q. You didn't actually see the accident.

A. I did not.

Q. Nor observe anything about the accident. You got there after the accident?

(Testimony of Earl F. Parks.)

A. No. I arrived there approximately, maybe an hour and a half after the accident.

Q. Do you remember the name of Mrs. Zane?

A. Yes, I do, I remember seeing the young lady in the hospital at the time along with a [280] great number of others that were injured.

Q. How many passengers were injured in that accident, do you remember, Mr. Parks?

A. I have not reviewed the accident files since then, but at the time it seems to me there was approximately twenty or twenty-two injured at the time. When I arrived in Indio they had them in both hospitals there, and some on stretchers, on these litters in the hallways where they could hardly accommodate them. They were taking the most serious ones first.

Q. How many hospitals were in Indio at the time?

A. Two, to the best of my knowledge.

Q. What are the names?

A. Well, just the Coachella Valley Hospital and the La Casita, something like that. It is a Spanish name for the little house. La Casita, I believe.

Q. Do you know whether or not those injured passengers were taken to both hospitals?

A. That is right, they were distributed to both hospitals. All doctors available there were called for emergency treatments.

Q. You say all doctors available, where?

A. At Indio, California. [281]

(Testimony of Earl F. Parks.)

Q. Do you know how they were taken from the scene of the accident to the hospitals?

A. Some of the—the majority of them were taken in by ambulances from Camp Young. There was a large Army camp just east of Indio at the time, and there is an Army ambulance station at Indio and they prevailed upon everything available at the time to get those injured in.

Q. Where did this accident occur, west or east of Indio?

A. It happened approximately sixteen miles west of Indio.

Q. That is on the Los Angeles side?

A. That is right, on Highway 99.

Q. Do you know Dr. Blackman in Indio?

A. I know him, yes. I have met him. I have been treated myself by Dr. Blackman.

Q. In the event of injuries to passengers, Mr. Parks, outside of first aid and taking them to the hospital, does the Pacific Greyhound Lines furnish medical services at the hospital?

Mr. Carson: We object to that, he is not in a position—

Mr. Baker: (Interrupting) Well, you are the Superintendent, you know what they do or not, don't you? [282]

A. I do.

The Court: Well, we are interested in this particular case.

Mr. Baker: Well, all right. In reference to this case, did the Pacific Greyhound Lines furnish

(Testimony of Earl F. Parks.)

any medical service or hospital service to Mrs. Zane?

Mr. Stahl: We object, if the Court please, on the ground that he has not shown whether he knows that they did that or not. He was one man. It is a large organization. He was simply down there away from—

Mr. Baker: (Interrupting) Well, you were in charge of the Pacific Greyhound Lines in Indio, California, at the time of this accident?

A. That is right. I was there shortly after the accident.

Q. You were solely in charge, were you not, of the Pacific Greyhound Lines? A. Yes.

Mr. Baker: All right, does that satisfy you? Did the Pacific Greyhound Lines furnish any medical services or doctors to Mrs. Zane?

A. No, they did not.

Q. Was Dr. Blackman at that time, or is he now, an agent of the Pacific Greyhound Lines?

Mr. Stahl: We object to that, if the Court please, on the ground that calls for a conclusion.

Mr. Baker: Was he at the time of this accident an agent for the Pacific Greyhound Lines?

Mr. Stahl: We object to that on the ground it calls for a conclusion.

The Court: Well, I don't know. That would call for a legal conclusion. There was no relationship at all between this doctor and the Pacific Greyhound Lines?

(Testimony of Earl F. Parks.)

Mr. Baker: Well, there was some relationship, I will establish that as a predicate.

Q. What was the relationship between Dr. Blackman and Pacific Greyhound Lines at the time of this accident?

A. The only relationship between Dr. Blackman and the Pacific Greyhound Lines is, that he is on the medical staff of the Southern Pacific Company. The Southern Pacific Company, being a minority stockholder in the Pacific Greyhound Lines, the employees of the Pacific Greyhound Lines contribute \$1.75 a month towards the Hospital Association and which assures them of any medical attention in case of sickness, anything happening or accidents happening off of their tour of duty. If they are injured on their tour of duty, then it comes under [284] the State Compensation and they select a doctor of their own choosing. However, if they become ill—anything not covered by the State Compensation, then a treatment order is issued to the doctor in the territory in which they are treated without cost. However, the doctor only treats those who are employees and who are paid—paid-up members of the Hospital Association.

Q. In other words, the Pacific Greyhound Lines participate in the Hospital Association of the Southern Pacific, is that correct?

A. That is correct.

Q. And contribute the same amount—each employee contributes the same amount as the Southern Pacific employees of \$1.75 a month?

(Testimony of Earl F. Parks.)

A. That is right.

Q. Then those medical benefits—

Mr. Carson: (Interrupting) I think that question is slightly leading. I have not objected to it, but he has been putting every question in the words—I didn't object to it, but it certainly was a little bit leading, I would suggest.

Mr. Baker: I just uttered three words.

The Court: Yes.

Mr. Baker: These medical benefits which you have testified to, I will ask you whether or not they are available to any person except a paid-up employee of the Pacific Greyhound Lines?

A. To paid-up employees only. No others than an employee who is paid up and in good standing.

Q. And what disabilities do those medical benefits cover?

A. They cover sickness and accidents that have happened off of their tour of duty, off the job.

Q. The "tour of duty" you are referring to the course of employment?

A. In the course of employment. For instance, if I was out riding a horse on a Sunday and I was thrown, the hospital benefit would cover that. If I had been injured in the course of duty, then I would not come under the hospital benefits, but it would be the State Industrial Commission, being a claim against them.

Q. Well, does an employe who is injured in the course of employment, as you express it, the tour

(Testimony of Earl F. Parks.)

of his duty, come under this Hospital Benefit Association? A. They do not.

Q. How is that handled when an employee is injured in the course of employment?

A. That is handled by the Arizona State Industrial Commission. Those that are employed from this Division are brought into the State of Arizona. They all come into the Arizona State Industrial Commission, to which we pay our insurance and benefits into them, and all accidents while employed on their tour of duty comes under the Industrial Commission.

Q. In the event of an employee being injured in the course of employment who is entitled to the benefits of the State Workmen's Compensation Act, if he desired to go to a doctor who represented the company, with reference to employees coming under the Hospital Association, how would that doctor be paid, if you know?

A. If he is injured in the course of employment, that doctor is compensated by the Industrial Commission.

Q. At the regular rates?

A. At the regular rates, that is correct.

Q. Is there any provision for the treatment of passengers by doctors or hospitals?

A. There is none whatsoever. In case of an accident, why, at any place throughout the seven states through which we operate, the passengers are [287] taken to the nearest hospital, or where

(Testimony of Earl F. Parks.)

they can obtain medical attention regardless of who or where, or what it may be.

Q. Do I understand you, then, that all that the Greyhound Lines will do in the event of injuries to passengers is to take them to the nearest doctor, is that correct? A. That is correct.

Q. Do you know whether that was done in the case of this bus accident in which Mrs. Zane was so seriously injured?

A. That is true. That was reported to the Highway Patrol and the Sheriff's Office at Indio, and they dispatched all the ambulances that were available to get the injured people into the two hospitals. They were not designated. They just brought them in there and all the doctors were summoned for this emergency and treatment was given in accordance with their needs.

Q. Mr. Parks, as Superintendent of the Greyhound Lines Division, does Dr. Blackman have any authority to negotiate for the settlement of claims against the Pacific Greyhound Lines?

A. He had none whatsoever. He is a private practicing physician in the city of Indio, California, and a member of the Coachella Hospital [288] there. He is not retained by the Pacific Greyhound Lines whatsoever.

Q. Did Dr. Blackman have the right to make any representation to Mrs. Zane, or any other person, binding the Pacific Greyhound Lines?

Mr. Stahl: We object to that, if the Court please, on several grounds. One, it is a leading

(Testimony of Earl F. Parks.)

question and the other is that this witness we think does not—has not shown that he is able to answer that question of his own knowledge.

The Court: Well, who, in the company would be? If you would call the President he might not have anything to do with it; the Board of Directors might not have anything to do with it. Maybe this man claims he knows that. He says he is. We have to accept his word.

The Witness: What was the question?

(The question was read by the Reporter.)

A. He did not.

Mr. Baker: I will ask you whether or not Mrs. Zane was taken to the Coachella Hospital by reason of Dr. Blackman being there, or what was the reason for her being taken there?

Mr. Stahl: If the Court please, I think he has already testified that he came there an hour afterwards. [289]

The Court: Yes, the objection is sustained.

Mr. Baker: I believe you already stated that some of the injured persons were taken to one hospital and others to another, is that correct?

A. That is correct.

Q. Was there any distinction as to which hospital they should be taken?

Mr. Stahl: Now, if the Court please, he wasn't there at all.

The Court: No, he was not.

Mr. Baker: I will ask you whether or not you

(Testimony of Earl F. Parks.)

know if the Pacific Greyhound Lines had anything to do with taking these passengers to the hospital?

Mr. Stahl: He was not there for that purpose.

Mr. Baker: Well, do you know?

Mr. Stahl: Object to it on that ground.

Mr. Baker: Do you know whether they did or not?

The Witness: They did not.

Mr. Stahl: Well, I move that it be stricken, because he could not possibly know that.

The Court: He had to learn it from what someone told him. It may be stricken.

Mr. Baker: You may cross examine. [290]

Cross Examination

Mr. Stahl:

Q. When you spoke of this employee arrangement you said something about the Pacific Greyhound having a doctor in each territory, or, what I am getting at, is, was Dr. Blackman the doctor in that Indio territory?

A. Dr. Blackman represents the Southern Pacific Hospital Association and he is there and for the purpose of—he is in private practice and also contracted with the Southern Pacific Company for treating the employees, those that are paid up for those benefits in the Hospital Association.

Q. What I am getting at, he is the doctor in Indio who does handle such things for the Southern Pacific and, in turn, for the Pacific Greyhound?

A. For employees only.

(Testimony of Earl F. Parks.)

Q. That is what I mean.

A. That is right.

Q. And he is—do you know his connection with the hospital there; he owns the hospital, does he, or has an interest in it?

A. I don't know. He is on the staff of the Coachella Hospital. It is the largest of the two.

Q. And you were not—you were out at Palm Springs when this accident happened? [291]

A. I was stopping at Palm Springs the night of December 10, 1942.

Q. When did you first hear of it?

A. Approximately, around 5 o'clock in the morning.

Q. And how far is Palm Springs from Indio?

A. Oh, it is approximately twenty miles.

Q. You say you arrived at the scene of the accident about an hour and a half afterwards?

A. Approximately. When I received the 'phone call, why, I washed, dressed and jumped in the car and first went over to the scene of the accident and then from there on into Indio.

Q. Who was it that called you?

A. The agent at Indio. He was not the agent. It was a call from the sheriff's department for me.

Q. And you talked to the sheriff there?

A. I don't know who it was, whether it was a deputy sheriff or, more than likely a deputy. The sheriff's office in Riverside. That is a sub-station.

(Testimony of Earl F. Parks.)

Q. When you arrived at the scene of the accident was anybody there?

A. No one there at all. The driver of the truck was there, but not our driver or any of the passengers. [222]

Q. Now, the Pacific Greyhound does employ some—you have in your employ, do you not, chief surgeons, or surgeons?

A. We have no doctors under our employ whatsoever.

Q. What do you use, Southern Pacific doctors?

A. That is correct. The employees, when they contribute to the benefits at the hospital are assessed a fee of \$1.75 a month. Our members are then entitled to treatment.

Q. You know the connection of the Pacific Greyhound with the Southern Pacific, and that is, that the Southern Pacific owns stock of the Greyhound?

A. A small portion of stock.

Mr. Stahl: That is all.

Mr. Baker: I forgot to ask Mr. Parks a question, which is my fault. May I open up that point?

Mr. Carson: Yes, go ahead.

Mr. Baker: Will you mark this for identification, please?

(The document was marked as Defendant's Exhibit AE for identification.) [293]

(Testimony of Earl F. Parks.)

Re-Direct Examination

Mr. Baker:

Q. Mr. Parks, by what means do these employees obtain treatment from a physician; I mean, is there some procedure by which this must be gone through?

A. The Division Superintendent and those authorized by him may sign an order, a treatment order to the doctor.

Q. Do I understand, then, that they must have an order from the Superintendent or somebody under the Superintendent's authority before they can even go to a doctor?

A. That is correct, outside of emergency. Then the doctor will call and check with us and see if they are in good standing and they will assure them that they will mail an order to them.

Q. I am handing you Defendant's Exhibit AE for identification and ask you what that is, if you know?

A. This is a treatment order that is issued by the Pacific Greyhound Lines to a sick or injured employee.

Mr. Baker: We offer this in evidence.

Mr. Carson: We think it is absolutely immaterial. Object to it. It is immaterial and [294] has no relationship at all.

The Court: It may be received.

(Thereupon the document was received as Defendant's Exhibit AE in evidence and read to the Jury by Mr. Baker.)

(Testimony of Earl F. Parks.)

Mr. Baker: I guess that is all, now, Mr. Parks. You may cross examine.

Mr. Carson: No questions.

Mr. Stahl: That is all.

(The witness was excused.)

Mr. Baker: We now offer in evidence the testimony of Dr. Blackman and the nurse. They are both on one deposition, the depositions of Dr. Blackman and Mrs. Gladys Payne. Will you both stipulate that they are fifty miles from Phoenix at this time?

Mr. Stahl: Yes.

Mr. Baker: If you will not, I will testify.

Mr. Stahl: No, that is all right.

Mr. Baker: Can Mr. Whitney participate in reading these depositions? Suppose that you interrogate and I will give the answers to the best of my ability.

(Thereupon Mr. Baker took the witness stand.)

Mr. Baker: I will read the first part of it, Mr. Whitney. [295]

Mr. Baker (Reading Stipulation, as follows:)

“In the District Court of the United States
for the District of Arizona

“Civ. No. 642

“ZOA H. ZANE and JACK ZANE, her husband,
Plaintiffs,
vs.

“PACIFIC GREYHOUND LINES, a corporation,
Defendant.

“STIPULATION FOR TAKING
DEPOSITIONS

“It Is Hereby Stipulated and Agreed by and between attorneys for plaintiffs and defendant above named, that the defendant may on Wednesday, the 21st day of February, 1945, at the hour of 1:00 o'clock in the afternoon of said day at 519 Miles Avenue, Indio, California, before a Notary Public in and for the State of California, duly qualified to take depositions as provided in Rule 28, Rules of Civil Procedure for the District Courts of the United States, take the depositions of witnesses for the defendant in said action upon oral examination, whose names and addresses are as follows:

“Dr. W. H. Blackman of Indio, California

“Mrs. Gladys Payne of Indio, California

“Said examination to commence at said hour [296] of said day and continue from hour to hour and from day to day until completed.

“The depositions when so taken shall be transcribed, certified and returned to the Clerk of the above entitled Court as provided in Rule 30, Rules of Civil Procedure for the District Courts of the United States.

“Dated this 17th day of February, 1945.

“TERRENCE A. CARSON
STAHL & MURPHY
By TERRENCE A. CARSON
Attorneys for Plaintiffs.
“BAKER & WHITNEY
By ALEXANDER B. BAKER
Attorneys for Defendant.”

(The questions contained in the Depositions were read by Mr. Harold Whitney, and the answers were read by Mr. Baker.)

Mr. Baker:

“In the District Court of the United States
for the District of Arizona

“Civ. No. 642

“ZOA H. ZANE and JACK ZANE, her husband,
Plaintiffs,
vs.

“PACIFIC GREYHOUND LINES, a corporation,
Defendant.

“Deposition of Dr. W. H. Blackman.

“Be It Known, that pursuant to the Stipulation for Taking Depositions, hereto attached, and on

the 21st day of February, 1945, at the Office of Dr. W. H. Blackman, 519 Miles Avenue, in the City of Indio, County of Riverside, State of California, before me, Charles H. Shaw, a Notary Public in and for said County of Riverside, State of California, duly commissioned to administer oaths, personally appeared Dr. W. H. Blackman, called as a witness by the defense in the above entitled cause, who, being by me duly sworn, was interrogated by Roy W. Colegate, Esq., Attorney for the Defendant; the Plaintiffs being represented at the taking of said deposition by Terrence A. Carson, Esq., of counsel for Plaintiffs; whereupon the following testimony was taken and proceedings had:

“DOCTOR W. H. BLACKMAN,

having been duly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

“Direct Examination

“By Mr. Colegate:

“Q. Dr. Blackman, you are a practising physician [298] and surgeon here at Indio?

“A. Yes, sir.

“Q. And you are licensed in the State of California in that capacity? A. Yes, sir.

“Q. You are an M. D.? A. Yes, sir.

“Q. Will you tell us, please, the nature of your training and experience you have had?

(Deposition of Dr. W. H. Blackman.)

“A. I am a graduate of the University of Southern California; received my degree in 1933, after completion of my first year of internship at the L. A. County Hospital. I stayed on a second year of internship at the L. A. County Hospital.

“In the Spring of 1934 I was down in El Centro, and became Resident, in charge of the County Hospital there; remained there from April 1, 1934, to September 1, 1936.

“I came here to Indio as an associate of Dr. Gray, from 1936, September 1st, to July 1, 1938, at which time Dr. Pawley and I bought Dr. Gray’s practice, and bought the Coachella Valley Hospital from him—the old hospital.

“Since that time I have been in partnership with Dr. Pawley, in practice here. [299]

“Q. Will you tell us the nature of your private practice, that is, whether there is any special line of work that you have followed, or just what sort of work you have done?

“A. Well, of course, in this type of locality we have to do general practice. I don’t remember the exact percentages. We had it summarized recently. I think around about 20 per cent of our practice is railroad work. We do quite a little orthopedics, and surgery, and internal medicine—everything, including obstetrics.

“In the County Hospital at El Centro I did practically all of the orthopedic work, and a great deal of the general surgery.

(Deposition of Dr. W. H. Blackman.)

“Q. Since coming to Indio, will you tell us to what extent you have engaged in orthopedic work?

“A. Well, I couldn’t tell you off-hand, as far as percentage of practice is concerned; but we do quite a lot of industrial work, and railroad work. We have a great many highway accidents here, so that we do—I would think it would probably be safe to say pretty close to 25 per cent of our work would fall under the head of orthopedic surgery of one type or another.

“Q. Has that been true during the years you [300] have practiced here at Indio? A. Yes.

“Q. Will you tell us, Doctor, whether you treated Zoa Zane during the period from December, 1942, until March of 1943?

“A. Yes. She was brought into the Coachella Valley Hospital by ambulance on the morning of December 11th, following a Greyhound bus accident out here near Indio, and remained under our care until the 8th of March, 1943.

“Q. When you say “under our care,” what do you mean by that?

“A. Well, Dr. Raymond O’Connell was associated with me in practice at that time, and he is no longer with us. She was under my direct care. He assisted me in the operation. That is about all.

“Q. Will you tell us, please, what you found as to her condition when she was brought in on December 11th?

“A. She was in very profound shock, and in a rather critical condition, on admission, due to a

(Deposition of Dr. W. H. Blackman.)

very severe crushing injury of the right foot and ankle and lower part of the leg. The bones were both completely fractured, and the soft tissues were so badly traumatized that both the blood and [301] the nerve supply to the foot had been destroyed, and the foot was just hanging on by tendons and shreds of muscle. She also had a sprain and abrasion of the left ankle, and an abrasion bruise over the right knee, and some minor superficial abrasions and lacerations of the other extremities, and I believe some abrasions of the face.

"Q. Will you tell us the extent of the examination which you made of her at that time, on December 11th?

"A. Well, I made a complete examination when she was admitted, I would say from the top of her head down, checking for clinical signs of fractures, and internal injuries. Her condition was such at the time that we gave her blood plasma very soon after admission; gave her morphine for pain, and blood plasma. Her condition was such at the time that we simply did what is called a guillotine type of operation on this crushed extremity; we simply severed the remaining soft tissues, put antiseptic dressings on, and applied—

"Q. Excuse me, Doctor—

"A. —sterile dressings, I would say.

"Q. I was going to ask you, after finishing your answer to the other question, what you did by way of treatment. But first of all, when you [302] examined her upon her admission, did you find any

(Deposition of Dr. W. H. Blackman.)

injuries other than those you have already testified to? A. No.

“Q. Will you tell us, please what you did for her in the way of treatment after this examination and finding the injuries you have described?

“A. Well, after examining her, we took X-rays of the crushed foot and leg,—just more as a matter of record, to show the extent of the bone damage; and I believe X-rayed the knee, because there was quite a severe abrasion and bruise over the knee.

“Q. That is, the right knee?

“A. The right knee. There wasn't sufficient clinical evidence of any other fractures that we felt warranted in taking other X-rays. The abrasions and superficial lacerations were cleaned up, dressed. We completed this emergency amputation after she was out of shock sufficiently to proceed.

“Q. When was that amputation performed?

“A. That was done on the morning of admission. I would say probably within two hours, or probably within about an hour after she was admitted. She was given plasma first, and as soon as she was out [303] of shock, we performed the operation.

“Q. Will you tell us, please, what other treatment, if any, you rendered to her on the day of her admission, beyond what you have stated?

“A. She was put to bed after surgery. We put traction onto the leg to prevent retraction of the muscles. Just treated her mostly for pain and shock, the remainder of that day.

(Deposition of Dr. W. H. Blackman.)

“Q. During the time that she was under your care she was kept at what hospital?

“A. Coachella Valley Hospital.

“Q. That is here at Indio? A. Yes, sir.

“Q. As a part of your care and treatment of her, did you keep a chart or record of what you did?

“A. Yes, sir.

“Q. And what the nurses under you did?

“A. That is right.

“Q. Now, Doctor, to the extent that it may be of assistance to you, I would like for you to refer to that chart or record of her care, and then next tell us, please, what your course of treatment consisted of for this woman, over the period following her admission on December 11th until the time she was discharged from your care, [304] or left your care.

“Mr. Carson: I would like to look at that chart before he testifies.

“Mr. Colegate: Yes, that will be satisfactory. At this point may the record show that Mr. Carson was afforded an opportunity to examine the charts and records, and that he did so. Mr. Carson, there is no objection to the Doctor referring to those, in answering the question which was propounded?

“Mr. Carson: No.

“A. On the first day of hospitalization, in addition to receiving blood plasma, she also received a whole-blood transfusion. She was admitted to the hospital at 7:00 in the morning. Morphine, $\frac{1}{4}$ grain, given at 7:10. Blood plasma was—500 cc.

(Deposition of Dr. W. H. Blackman.)

blood plasma was started at 7:25, and followed with 500 cc of 10 per cent glucose.

"Do you want me to go through this whole thing?

"Q. (Mr. Colegate): I don't think we want to ask you for the exact details; but in substance we would like to know what course of treatment was given to her over that period until she left your care. [305]

"A. The first day she was given a whole-blood transfusion at 11:45. She also received tetanus and gas antitoxin, and was given a general treatment from then on until her condition improved sufficiently that we felt that it was safe to do a prosthetic operation. We did a repair of this amputation by going up to a point approximately 7 inches below the knee joint and removing the bone, rounding it off, and bringing the posterior flap of the heavy calf muscles down over the end of the bone, in order to give the stump padding so that she would be able to wear an artificial limb. Due to the loss of blood at the time of injury, she had developed quite a profound anemia. She received a total of 4 whole-blood transfusions during the time she was in the hospital. At least one of those I believe was given after the repair of this amputation. She ran a low-grade temperature for a while, and we feared at first she might have a bone infection. X-rays were taken, and that was ruled out. After receiving an additional blood transfusion, the temperature finally came back to normal, and the course of her convalescence, in the latter

(Deposition of Dr. W. H. Blackman.)

part of her convalescence, was uneventful. We simply were giving her [306] time to regain her strength before she was dismissed.

"Q. What was the time, please, at which you considered the possibility of bone infection, after you gave the transfusion to which you referred?

"A. May I refer to the X-ray to get the date from that? It was the early part of February, and the latter part of January, that she continued to run a fever; and on the 3rd of February an X-ray of the amputated area did not reveal any sign of bone infection.

"Mr. Carson: What date was that, Doctor?

"The Witness: The 3rd of February, 1943, that an X-ray was taken of the stump.

"A. She was on sulfa drugs at that time, I believe—yes; in fact, we had her on sulfathiazole for the latter part—starting on January 31st she was placed on sulfathiazole, and that was continued up to the time this X-ray was taken on the 3rd, and discontinued when the bone showed no evidence of infection.

"She was also given a great deal of Reticulogen. That is a liver extract that is used for [307] stimulation of blood-building.

"I believe all those transfusions were given prior to the repair of the amputation. When she started running fever again, we started her on Sulphathiazole, and took X-rays, and the temperature came down to normal in a few days' time, and the Sulpha-

(Deposition of Dr. W. H. Blackman.)

thiazole was stopped, and it wasn't necessary to give her a transfusion after that.

"Q. (Mr. Colegate): During the course of your treatment did you fit Mrs. Zane with an artificial limb?

"A. We had a man come down from an Orthopedic Supply House in Los Angeles, Millikin, I believe was his name, and he took the measurements and made an impression of the limb, and sent the artificial limb down after it was made. The impression was taken, it was made, and sent down to her, and only reached her I think just a day or so before she left the hospital.

"Q. Can you tell us when it was the artificial limb arrived?

"A. I believe the day before she left here.

"Q. Did you fit it to her, or apply it?

"A. No. The Nurses helped her put it on, and she tried it with crutches, and she went out of the hospital without it, though. She didn't have [308] it on when she left the hospital. She went out with the crutches, but without the artificial limb being on.

"Q. Did you see her walking with the artificial limb?

"A. No, I didn't. I might add, she was very anxious to leave as soon as the artificial limb arrived; and I suggested that she try it out for a few days, but she was very anxious to leave, and her husband come over after her, and he preferred to take her home and practice using it at home.

"Q. Doctor, during the course of treatment of

(Deposition of Dr. W. H. Blackman.)

Mrs. Zane, did you at any time ascertain any fracture of the neck of the right femur?

"A. No. At the time of admission I made a complete examination of the hip region and pelvis, along with the general examination, and there was no soreness over the hips, or no muscle spasm—nothing to suggest fracture. There was no rotation of the thigh, or shortening, suggestive of fracture—and those are all clinical signs that we look for.

"Q. During your course of treatment of Mrs. Zane, will you tell us whether you had occasion to move and activate her right leg?

"A. A great many times.

"Q. Will you tell us when it was that you had [309] occasion to so do?

"A. No specific times; but in doing the dressings, which are done daily there for the first few weeks of hospitalization, we had to raise the leg, which would naturally cause motion at the hip joint, and there was never any complaint made by her about pain in the hip region at any time.

"Q. You have said that during her daily dressings the first few weeks, you had occasion to move that right leg of hers. Will you tell us, please, Dr. Blackman, whether you had occasion to move, or lift, the right leg after those first few weeks?

"A. During the last few weeks that she was in the hospital, when we were trying to get her up on the crutches, she complained of some stiffening and soreness of the right knee; but we could find no

(Deposition of Dr. W. H. Blackman.)

evidence of any reason for it, other than the fact it had been immobilized for such a long period of time; and even at that time there was never any complaint of pain in the hip, no muscle spasm about the hip, or no pain on movement of the thigh when we raised it up off the bed. In fact, I recall one time—I would say possibly about two weeks before she left the [310] hospital—in which I raised the right thigh pretty well up off the bed, and took hold of the knee and gently manipulated the knee, trying to encourage her to move this stump and knee-joint, and holding her leg up off the bed, and allowing her to do that, helping her move the stump—and she made no complaint about pain in the hip region at all.

“Q. During those last few weeks she was under your care, what, if anything, did you do toward treatment of this stiffness of the right knee of which Mrs. Zane complained?

“A. We advised her to move it as much as possible, and, on occasion—I would say maybe two or three times a week—I checked up with her to see if she was getting motion in the knee, and she was gradually getting improved motion in the knee-joint. I think we used a heat lamp on it, and had the nurses massage the thigh muscles and leg muscles around the knee region.

“Q. Did you during those weeks personally move or flex that knee of Mrs. Zane’s?

“A. Yes, I did.

“Q. Approximately on how many occasions?

(Deposition of Dr. W. H. Blackman.)

"A. Oh, probably on at least half a dozen occasions during the last three weeks she was in. [311]

"Q. Tell us how you did that flexing?

"A. Simply raised her thigh up off the bed and took hold of it, and some of the time had her sit up on the edge of the bed, and took hold of the stump and moved it back and forwards up to the point where it was beginning to hurt; and she was gradually getting normal motion back there.

"Q. Tell us whether—that is, to what extent during those last few weeks you were flexing the knee in the manner you have testified to—you moved or agitated the upper parts of the right leg of Mrs. Zane?

"A. Well, simply as I stated before, in order to move this stump as she was lying down in bed, we had to raise the thigh off the bed in order to move the knee, and that would naturally cause motion in the hip region; and, of course, if she was sitting up on the edge of the bed, the motion of the stump didn't move the hip joint; but the mere act of sitting up in bed apparently caused no pain in the hip region, whereas it usually would in the case of any patient I have ever seen—and I have seen a great many with fracture of the femur neck. They don't like to sit up, and sit square; if they do, they get pain in the hip region. [312]

"Q. Doctor, during those first few weeks that you were daily dressing the leg of Mrs. Zane, tell us what, if any, complaints were made by Mrs.

(Deposition of Dr. W. H. Blackman.)

Zane as to pain or discomfort in the upper part of her right leg.

"A. She never made any complaint about pain in the upper part of her right leg. Her only complaint of pain was the soreness of the stump itself, or of soreness in the knee joint.

"Q. During those last few weeks of the treatment of Mrs. Zane, at which time you were flexing the right knee, what, if any, complaints were made to by Mrs. Zane regarding pain or discomfort in the upper portion of her right leg?

"A. I simply do not recall of her ever having made any complaint whatever as to pain in the right hip region at all.

"Q. Aside from the taking of X-ray pictures, Doctor Blackman, how do you ascertain and diagnose a fracture of the neck of the femur?

"A. The fracture of the neck of the femur, if it is a complete fracture, always results in some shortening of the thigh, and rotation usually outward; that is, the thigh turns out to the side, and the muscle spasm pulling up on it usually causes some shortening, so that even though the [313] lower extremity was off, you would notice the difference in the level of the knees, when they are lying flat in bed. In addition to that shortening and rotation, why, there is always muscle spasm, spasm of the muscles about the hip. Motion of the hip joint—I mean motion of the thigh in any direction usually causes pain to be referred to the hip joint. The symptoms are really quite classical, and

(Deposition of Dr. W. H. Blackman.)

a definite course of symptoms of shortening, rotation and muscle spasm, and pain over the hip, tenderness to pressure over the hip, and pain on motion of the hip.

"Q. During your treatment of Mrs. Zane did you encounter any of those symptoms of fracture of the neck of the right femur which you have referred to in your preceding answer?

"A. No, I did not.

"Q. What, if anything, did Mrs. Zane say to you regarding pain or discomfort in her right hip and upper right leg, during your entire course of treatment of her?

"A. I don't recall that she ever made any complaint about pain in that region.

"Q. Tell us, please, Dr. Blackman, whether in your opinion Mrs. Zane was afflicted with a fracture of the neck of the right femur at any [314] time while she was under your care?

"A. I do not believe so.

"Q. Were you acquainted with a Mr. William Cameron in December of 1942?

"A. Yes, sir.

"Q. What conversations, if any, occurred between Mr. Cameron and Mrs. Zane, at which you were present?

"A. The only conversation that occurred in my presence was probably about two weeks after she was injured. He was down one day, and asked about her condition, and I told him I didn't think she was in any condition to discuss settlement; that

(Deposition of Dr. W. H. Blackman.)

there was a lot of work to be done, her condition wasn't good. He asked if he could meet her, and I told him I would take him in and introduce him, but I didn't think he should discuss terms of settlement at all with her. I took him in and introduced him, and told her he was the adjuster that was investigating her accident—

“Mr. Carson: Pardon me, Doctor. What date was that?

“A. I don't recall exactly. I didn't make any record. I really think it was nearer two weeks after the accident before Cameron ever saw her or talked to her at all, and then it was only [315] just to be introduced to her. I think he told her he was investigating the accident, and wouldn't bother her any at the time; and when she got feeling better, why, he would want to talk to her; but not to worry about things in the meantime.

“Q. (Mr. Colegate): About when did you say, Doctor, that this incident occurred when you introduced Cameron to Mrs. Zane?

“A. I would say approximately around about the 20th of December, probably.

“Q. Aside from that occasion, were there any other times when you were present at any conversation between Cameron and Mrs. Zane?

“A. No.

“Q. Were there any times when Cameron was present at any conversations which you had with Mrs. Zane?

“A. No, sir.

(Deposition of Dr. W. H. Blackman.)

"Q. In other words, the three of you were there together, except the one time you have told us about, is that right?

"A. That is the best of my recollection, the only time the three of us talked together; and that, as I said, was more a matter of introduction than anything else.

"Q. What, if any, directions or orders as to the treatment to be afforded Mrs. Zane did you receive from Cameron?

"A. None whatever, except that she was to be taken care of as a private patient.

"Q. Tell us, Dr. Blackman, whom you represented and acted for in caring for and treating Mrs. Zane?

"A. Myself. I might add here that at the time this accident occurred, some of the patients were taken to our hospital, and some were taken to Dr. Morris at the Casita Hospital. The only connection that I have with the Pacific Greyhound is that the employees of the Pacific Greyhound come under the same medical care plan that the Southern Pacific employees come under, and we take care of the Pacific Greyhound employees, and they bring treatment orders in just the same as though they were railroad employees. We have no other connection with them whatever.

"Q. As far as your treatment and care of Mrs. Zane is concerned, who were you working for?

"A. Working for Mrs. Zane.

"Q. In treating and caring for her, what, if

(Deposition of Dr. W. H. Blackman.)

any, position or capacity did you occupy with the Greyhound Lines?

“A. None whatever, as far as her care was [317] concerned. I even, to be sure of how the thing was to be handled—soon after the accident occurred, I sent Dr. Walker, who was Chief Surgeon for the Southern Pacific Company, a telegram asking if they wished us to report to them in regard to the injuries of these passengers. The reason for that is because—

“Q. (Mr. Colgate): Doctor, you may tell what you did, but your reasons are something you cannot state.

“Mr. Carson: That is right.

“A. I received a wire back very promptly instructing me to take care of them as private patients—

“Mr. Carson: Now, wait a minute. We object to that unless the telegram—we object to it.

“Mr. Colgate: I think whatever occurred between Dr. Walker and the Doctor here is strictly hearsay, as far as that is concerned. That may go out.

“Mr. Carson: Very well.

“Q. (Mr. Colegate): Did you ever discuss with Mrs. Zane the matter of whether you were employed to treat her as agent and representative of the [318] Greyhound?

“A. I don’t recall that I ever did. I don’t think she ever asked me if I was. I thought that

(Deposition of Dr. W. H. Blackman.)

I made it clear to her that I had no connection with them.

"Q. In your presence did Mr. Cameron make any statement to Mrs. Zane as regards the matter of the Pacific Greyhound engaging, or not engaging you to treat her?

"A. No.

"Q. Do you have your ledger sheets here showing the account of yourself with Mrs. Zane covering the handling of this treatment and care?

"A. Yes, I do have (producing sheets).

"Mr. Carson: Let me look at those, please.

"Mr. Colegate: Let the record show Dr. Blackman has produced three yellow looseleaf ledger sheets. Will you tell us, please, what they are?

"A. Those are simply the bookkeeper's records of the daily charges, and I believe the total charges and credits.

"Q. Are these—

"Mr. Carson: Why don't you let the originals [319] go in?

"Mr. Colegate: I was going to say we might photostat them.

"Mr. Carson: I would rather have the original sheets.

"Dr. Blackman: You would have to get my attorney's permission to let those records leave our possession.

"Mr. Colgate: Is that Wallace Rouse?

"The Witness: No. In Los Angeles.

"(Discussion off the record.)

(Deposition of Dr. W. H. Blackman.)

“Mr. Carson: If you will photostat them, we will agree they may go in that way.

“(Record read by the reporter as follows:

“‘Will you tell us, please, what they are?

“‘A. Those are simply the bookkeeper’s records of the daily charges, and I believe the total charges and credits.’)

“A. Of Mrs. Zane’s record—or should I call it Mrs. Zane’s financial record?

“Q. (Mr. Colegate): You will have to tell us, Doctor, what they were. Are those sheets part of the accounts receivable ledger?

“A. Yes, they are.

“Q. Are they the first original entries of those items that are placed on them? [320]

“A. That is right.

“Q. Under whose supervision were they kept?

“A. Miss Ruth Bastow was the bookkeeper, and they were kept under my supervision. She was the bookkeeper at the time.

“Q. Are they the first original entries of the items placed thereon?

“A. Yes, sir.

“Q. They are part of your official office records?

“A. Yes, sir.

“Mr. Colegate: We wish to have those marked for identification. In order that they may be offered at the proper time, I would like, Doctor, to have photostatic copies made, front and back, of those sheets, so that we may return to you the originals.

(Deposition of Dr. W. H. Blackman.)

“The Witness: All right.

“Mr. Colegate: I take it, Mr. Carson, as far as the photostatic copies are concerned, there is no objection on the ground that the photostatic copies, rather than the originals, might be appended to the deposition?

“Mr. Carson: No. That is all right. They will be true and correct photostatic copies. [321]

“The Witness: We can have them photostated right here in town.

“(Which said photostatic copies were thereupon marked as Exhibits for identification.)

“Q. (Mr. Colegate): Will you tell us, please, Doctor Blackman, in whose name that account appears on your books, according to those sheets?

“A. Mrs. Zoa Zane, 1921 Portland, Phoenix, Arizona.

“Q. What is the total amount of charges shown thereon, if you have them totalled?

“A. \$1467.00, I believe.

“Q. As of what date?

“A. That was February 19th, I believe it was totalled to. I have another itemized statement, I believe, a copy of an itemized statement in the file.

“Q. What, if any, credits are shown on that record toward the account?

“A. \$1467.00.

“Q. On what date?

“A. It doesn’t look like she has dated it. Then there was another credit made on the day she left

(Deposition of Dr. W. H. Blackman.)

the hospital. The balance from February 19th to March 8th, the Zanes paid for by separate check.

“Q. What is the amount of that latter credit?

“A. \$140.90.

“Q. When was that credit made?

“A. On March 8th.

“Q. Well, then, Doctor, don’t the total charges exceed the \$1467.00?

“A. The date that settlement was made was February 19th, and Mrs. Zane paid for the balance of the period of hospitalization herself, directly by her own personal check.

“Q. Then there were additional charges of \$140.90 after that date?

“A. That is right.

“Q. And were paid for as stated by you?

“A. That is right.

“Q. Were you present at any time when Mr. Cameron discussed with Mrs. Zane the settlement of her claim?

“A. No, I was not.

“Q. Were you present at the time Mrs. Zane executed any release in connection with her injuries?

“A. No.

“Q. Were you present at the time when Mr. Cameron delivered any drafts or check to Mr. or Mrs. Zane?

“A. No. [323]

“Q. Did you ever have any discussions with Mr. Zane during this period that his wife was

(Deposition of Dr. W. H. Blackman.)
under your care in regard to settlement of the
claim of *Mrz.* Zane against the Greyhound?

“A. No, sir.

“Q. To what extent, if any, did you see Mr.
Zane present at the Coachella Valley Hospital dur-
ing the time Mrs. Zane was under your treatment?

“A. I only saw him two times, I think, at the
hospital. Once was either the 2nd or 3rd day of
her hospitalization, and the other time I think was
the morning that she left the hospital.

“Q. Do you remember what, if any, conversa-
tions you had with Mr. Zane on the first of those
occasions?

“A. The first occasion I simply informed him
as to her injuries, and the fact that we had had
to amputate her foot, and that it would require
secondary repair, and her condition was still rather
critical, but I felt she would probably survive.

“Q. Anything more to that first conversation
which you recall?

“A. I don't recall that there was much more
to it than that.

“Q. Do you remember what, if any, conversa-
tion [324] in substance, you had with Mr. Zane
at the time Mrs. Zane was leaving the hospital?

“A. Practically no conversation with him on
that day. They had the drafts there in settlement,
and they were endorsing those drafts; and I don't
recall having any particular conversation with him
at the time.

“Q. Was Mr. Cameron there at that time?

(Deposition of Dr. W. H. Blackman.)

"A. No. He had been there, I think, the day before. This was the morning after they had received the drafts.

"Q. When next after Mrs. Zane's departure from the hospital did you have any conversation with Mr. Zane?

"A. It was in October of 1943, I believe. I think it was approximately October 12th. However, I am not certain, without checking that back. He called me at my home, long-distance, from Phoenix, and the same evening he also called the Hospital and talked to the Nurse there.

"Mr. Carson: Now, wait a minute. Don't repeat any conversation with the Nurse.

"Q. (Mr. Colegate): He talked to you just the one time? [325]

"A. Yes.

"Q. You tell, if you will, please, the substance of the conversation, as best you can, that was had between you and Mr. Zane at that time.

"A. At the time I received this long-distance call Mr. Zane came on the line and told me who he was. It was very difficult to understand him; his speech was thick and slurring, and I had a great deal of difficulty in finding out just what he was calling about, and finally obtained information that Mrs. Zane was then in the hospital in Phoenix, under care of some doctor over there, and he stated that the doctor found that she had a fracture of the right hip, which we had overlooked, and that—he went on with quite a long discourse

(Deposition of Dr. W. H. Blackman.)

to the effect that we held ourselves out to be good and up-to-date doctors, but that we failed to find this condition, and that she was unable to use the artificial limb; was then in the hospital, and would have to be for some time, and would have to have an operation that would be very expensive, and that they had no money to take care of it—and wound up by threatening to sue me and sue the hospital.

“Q. Doctor, rather than saying he ‘threatened’, [326] tell us, if you can, substantially what he said, rather than what you concluded.

“A. As near his own words as I can put it, he said, ‘I am going to sue you and your god-damn hospital, and when I do, the whole State of Arizona will be backing me up.’

“Q. Anything more of that conversation that you recall?

“A. I told him then that since he was making a threat of that nature, that we couldn’t discuss the case any further, and he would have to talk to my legal representatives. He attempted to go on, and I told him I would have to hang up on him, if he didn’t cease talking, because there was nothing further for us to discuss.

“Q. Tell us, please, whether on February 19, 1943, Mrs. Zane was being administered narcotics?

“A. She was not.

“Mr. Carson: Does he know whether she was administered narcotics?

“Mr. Colegate: He said she wasn’t.

(Deposition of Dr. W. H. Blackman.)

"Q. Did you see Mrs. Zane on February 19, 1943?

"A. Yes, I did. [327]

"Q. On that day, to your knowledge was she under the influence of narcotics?

"A. No. She hadn't received any for some time.

"Q. Was there anything irrational about her conduct at that time?

"A. No.

"Q. Tell us her mental state, as you observed it on that date?

"A. Perfectly normal, as far as I could observe.

"Q. What, if any statements, Doctor, did you make to Mrs. Zane during the time she was under your treatment regarding any other fracture about her body, other than those below the right knee?

"A. I think soon after admission she asked if she had any other fractures, and I told her that she did not have.

"Q. Did you at any time state to her she had any other fractures about her body?

"A. I don't recall of doing so.

"Q. You don't recall any representation in that regard?

"A. No.

"Q. What, if any, conversation did you have with Mrs. Zane regarding the extent of the use she might have of the right leg upon being fitted with an artificial member?

"A. At first she was very worried and despondent about the fact that she would have to wear an

(Deposition of Dr. W. H. Blackman.)

artificial limb; she guessed she would have to wear slacks the rest of her life; and I told her I didn't think that was the case; that modern artificial limbs were made so cleverly that many people wore them without it being known, and, in fact, some people became so skilled in their use that they could use them practically as well as their own member; that it was a matter that time would tell, of course, as to whether she acquired that amount of skill or not.

"Q. About when was it you had such a talk with her?

"A. Oh, probably a month or so after she first came in. We were talking one evening, and she was a bit despondent, sort of felt she was maimed for life and wouldn't be able to wear dresses, and act as a normal individual. I tried to reassure her by telling her that modern appliances were very difficult to detect, and some people really did become very skilful in using them, so that sometimes their best friends didn't even know they had an artificial limb. [329]

"Q. What, if any, discussions did you have with her regarding the specific results that might be obtained in her case with an artificial limb?

"A. I told her that that probably would depend largely on the individual case; that I couldn't say that she would be able to run a foot race, or dance, like some people do who wear artificial limbs; but that with practice she could probably acquire skill. It would take her some time to become accustomed

(Deposition of Dr. W. H. Blackman.)

to the limb, and that it might have to be readjusted to her, as the stump went through a normal amount of shrinkage, and that in time she probably would become quite adept in its use.

"Q. Did Mr. or Mrs. Zane ever inquire of you as to whether there were any other injuries to Mrs. Zane beyond those which you had treated?

"A. Not that I recall—that is, the two of them together didn't, the time I mentioned a while ago. I believe Mrs. Zane did ask if she had any other fractures, and I assured her there was no evidence of any other serious injuries at all other than this foot and leg that she lost.

"Q. About when was that conversation between you and Mrs. Zane, Doctor? [330]

"A. It was not so very long after admission; probably a week, maybe a couple of weeks after admission.

"Q. At the hospital? A. Yes.

"Q. Did you have any conversation with either Mr. or Mrs. Zane regarding the terms of the release which they executed to the Greyhound?

"A. No, I didn't have.

"Q. Did you have any conversation with either of them regarding the effect and meaning of the release that they gave the Pacific Greyhound?

"A. I didn't discuss it with them at all.

"Mr. Colegate: You may cross-examine."

The Court: We will have a recess at this time.

(Thereupon a short recess was had.)

(Deposition of Dr. W. H. Blackman.)

After recess, all parties as noted by the Clerk's Record being present, the trial resumed as follows:

(Mr. Terrence Carson assumed the witness stand and reads the answers contained in the Deposition on cross-examination; the questions therein being read by Mr. Stahl.) [331]

Mr. Stahl: This is the Cross Examination of Dr. Blackman by Mr. Carson.

“Cross Examination

By Mr. Carson:

“Q. Doctor, when Mrs. Zane first came to your attention, did you have any conversation with any representatives of the Greyhound as to how you were to be paid?

“A. Only to the effect that they would attempt to protect us when the settlement was made, in this way: That if she agreed to a settlement, that they would attempt to make the settlement for the hospital bill a separate check, payable to the Zanes and the Hospital and myself, so that they could endorse it over to us. But there was no agreement whatever —there was no contract between them and us. We were just holding the sack, as it were, and depending entirely upon the good will of the Zanes to pay the bill after they received a settlement.

“Q. Did Mr. and Mrs. Zane tell you their financial condition, when they first came in the hospital, or when you first saw Mrs. Zane?

(Deposition of Dr. W. H. Blackman.)

"A. No, I don't think any inquiry was made about that. [332]

"Q. You are sure there was nothing said that they would be unable to pay any hospital or doctor bill? Would you say that is right, Doctor?

"A. I don't think anything was said to that effect.

"Q. Did you make any inquiry?

"A. I didn't, personally, no.

"Q. Did the hospital make any inquiry?

"A. I don't know that they did. An action of this nature, where an insurance company and somebody is involved, we usually rely on the insurance company to try to protect us, and we don't force the issue as we would if it were a case of someone who had just been injured in their own automobile, where we make much more inquiry than we would in a case like this.

"Q. You are sure Mr. and Mrs. Zane told you they had no money, and couldn't pay any money, when they first came in?

"A. They may have told one of our representatives, but they didn't tell me that. I am not certain but what Mrs. Zane may have—come to think about it, I think Mrs. Zane did possibly, on one occasion, ask me about the hospital bill soon after she came in, and seemed to be worried about it; but I told her not to worry about that [333] at present; to just focus her attention on trying to get well, and let somebody else worry about that for the time being.

(Deposition of Dr. W. H. Blackman.)

“Q. Doctor, did you ever have any conversation with Mr. Cameron in regard to this total bill? Was it to be fixed at \$1,000.00, or any other sum?

“Mr. Colegate: Excuse me, Mr. Carson. I assume, under these rules of the United States District Court all objections, such as the objection that agency or authority is not shown, are reserved until the time of the trial, and we don’t have to object at this time?

“Mr. Carson: I think so.”

Mr. Baker: We renew the objection upon the grounds that it is hearsay and purely irrelevant insofar as the Greyhound Lines is concerned.

The Court: All right, you may answer.

Mr. Stahl: The witness didn’t answer the question so he asked another question along the same lines.

The Court: All right.

“Q. Did you ever have any conversation with Mr. Cameron as to how much you were to be paid for the entire work, Doctor?”

Mr. Baker: The same objection. [334]

The Court: He may answer.

“A. Yes. On one Sunday, I think it was in January of ’43, he was down, and wanted to know if he couldn’t make a settlement with me in advance—an agreement that our entire bill for hospitalization and doctor’s services wouldn’t exceed a thousand dollars; and I told him that I thought his request was entirely unreasonable; that I would most certainly refuse any such agreement, without

(Deposition of Dr. W. H. Blackman.)

consulting our bookkeepers; that I didn't even personally know at the time what the hospital total bill had reached; and he asked me to consider that and let him know.

"The next day, after talking with the bookkeeper, I wrote him a very definite refusal, and told I saw no reason why we should make any such settlement; that as far as we were concerned, the bill would have to go on the basis of the usual rates, and that is the method it would go on, and we wouldn't consider making any cut-rate settlement with him, if the bill went over a thousand dollars.

"Q. Doctor, do you ever remember discussing that particular question of how much it was to be, right near the door of the room where Mrs. Zane was a patient, with Mr. Cameron? [335]

"A. No. It was in a room fully 50 or 60 feet away from her room, and the doors were closed in between—at least the door was closed in the room we were in.

"Q. Did you ever inform her of some misunderstanding about the doctor bill, or did Mr. Cameron, that you know of?

"A. I certainly didn't. I don't know whether Cameron did.

"Q. Do you know how she learned of this conversation?

"A. Not from me.

"Q. Doctor, when she first entered the hospital, did you give her any assurance at all that she need not worry about the hospital bill; that the Grey-

(Deposition of Dr. W. H. Blackman.)

hound would take care of it? Did you have any such conversation with her?"'

Mr. Baker: If the Court please, I object to this on the ground that it is the same type of testimony, any conversation between Doctor Blackman and the plaintiff would be purely hearsay insofar as this Defendant is concerned; irrelevant, incompetent and immaterial.

The Court: The answer may be read.

"A. Only to this extent: As I stated before, when she was worried about the bill, I told her not [336] to worry about that; that probably she, of course, would receive some sort of a settlement sufficient to take care of it, but that I didn't speak for the Greyhound. However, that we were willing to take a chance, and the main thing for her to do was to get well, and we wouldn't worry about the financial arrangements at that time.

"Q. Doctor, do you know how many times, or how often Mr. Cameron would come down to see her in the period of almost three months—I mean two and a half months?

"A. Oh, he was down here several times. I don't believe he talked to her more than three times. He was down here in connection with these other cases that were in the other hospital, and sometimes dropped in and asked how she was getting along.

"Q. I will ask you if it isn't true that he was out here almost once or twice a week for nearly every week while she was a patient in the hospital?

"A. I don't believe so.

(Deposition of Dr. W. H. Blackman.)

“Q. Doctor, do you remember an occasion shortly after she was admitted to the hospital, that some patients were being removed to Los Angeles; there was some discussion between Mrs. Zane’s husband and you about whether or not it was [337] advisable to take her to Los Angeles to a hospital?

“A. I don’t recall discussing it with her.

“Q. You had no such conversation or inquiry?

“A. Not with Mr. Zane, I am sure.

“Q. Or Mrs. Zane?

“A. I don’t think I had with her either.

“Q. Was there any suggestion, when Mr. Zane came, that—did he inquire, or suggest, that the facilities in a Los Angeles Hospital were probably better for such a serious case?

“A. I don’t recall that he did.

“Q. You don’t recall?

“A. No.

“Q. You don’t know whether Zane talked with any of the other doctors about that, do you?

“Mr. Colegate: That was in Dr. Blackman’s presence?

“A. Not in my presence.

“Q. (Mr. Carson): Do you know whether he talked with your partner about it at all?

“A. I couldn’t say as to that. He may have talked with him. Pardon me just a minute. This is off the record.

“Mr. Colegate: In this testimony you are only entitled to tell what you know of your own [338] knowledge; so answer the question the best you can.

(Deposition of Dr. W. H. Blackman.)

"Q. (Mr. Carson): Doctor, did Mrs. Zane ever inquire of you whether or not any other bones were fractured in her body? Do you remember any occasion?

"A. The only occasion was, soon after hospitalization she asked if anything else was injured, and I told her no evidence of any other serious injury at all.

"Q. You didn't x-ray her leg—I mean her right hip?

"A. No, I didn't.

"Q. Were you pretty busy at that time?

"A. Well, pretty busy all the time. We were naturally quite busy the morning of the accident. We weren't unusually on the subsequent days or weeks, any more than usual.

"Q. Were some of the people that were injured in the accident taken to Los Angeles or San Bernardino?

"A. I don't recall for certain. There weren't any other serious injuries, and as nearly as I can recollect, I don't believe we transferred anyone because of their injuries. They may have gone on to Los Angeles and been referred to a doctor there for follow-up care, removal of sutures, [339] or something like that; but there were none definitely referred out for care, except for the fact that they wished to go on with their journey, they wished to return to L. A. or somewhere else.

"Q. Doctor, don't you think it would probably

(Deposition of Dr. W. H. Blackman.)

have been advisable, in a case like that, to have x-rayed the hip?

"A. I see no reason why, when there were no physical signs, and no complaint relative to the hip at all. Of course, the ideal situation, I presume, with any accident, would be to x-ray everything from the top of the head down to the feet. But it isn't practical; and unless there are some signs of injury, they don't usually do it.

"Q. You said she was running a fever some time along in January, Doctor. I think you described that. What date was that?

"A. Yes, there was a little drainage from the soft tissues of the stump. There had been an abrasion of the skin, and it had a slight infection, and we finally decided that was the cause of the fever, because when this little infected abrasion cleared up, her fever subsided, and she didn't have any more fever.

"Q. Do you think the giving of sulfa drugs had anything to do with reducing her fever? [340]

"A. It helped—it was really just a superficial infection, and it undoubtedly helped clear it up.

"Q. Doctor, is it easy to fracture a hip?

"A. No. Usually not, in a young person. It usually requires violence, a fall. One of the commonest means of getting this type of a fracture is a fall on the hip, falling on the point of the hip.

"Q. Could it have been, Doctor, possibly true that she did have a fracture of the hip along in January, and that was the cause of the fever?

(Deposition of Dr. W. H. Blackman.)

"A. No.

"Q. It couldn't have had any connection with it at all?

"A. No, it wouldn't have—I don't believe it could have been possible. Every person has fever, due to a fracture, it is a closed fracture, with no compounding of the fracture. Fever usually subsides within a day or two, or a very few days, and it is usually a very low grade fever, subsides quickly, and occurs only immediately after the fracture is sustained, and not a month to a month and a half afterwards.

"Q. Did Mrs. Zane ever discuss settlement at all with you, or was anything suggested about [341] settlement?

"A. She asked me, I think, in January, for my opinion as to what she should receive in the way of settlement, and I told her I hadn't the slightest idea; that I just didn't know what basis those cases were settled on, and I wouldn't even know how to begin to give her an estimate of what she should receive in the way of settlement.

"Q. Did you ever suggest to her, Doctor, that \$15,000 would be a good settlement?

"A. No. I never mentioned any figure to her whatever. In fact, I very carefully avoided it.

"Q. Doctor, this account is in the name of Mrs. Zoa Zane, and not in the name of her husband, is it?

"A. No.

"Q. When you keep accounts, do you keep—when

(Deposition of Dr. W. H. Blackman.)

a woman is married, do you generally keep it in the name of the husband or the wife?

“A. Usually keep it in the patient’s name. If it is a minor, sometimes one of the party’s name is put on there.

“Q. When you bill them, do you send the bill to the wife or the husband, generally, when you keep them in the wife’s name?

“A. We send them direct to the individual. [243]

“Q. To the individual. Who would be the individual—the husband or the wife?

“A. Well, in a case like this, the patient I should say.

“Q. You wouldn’t look to the husband for any liability in the case, then, as to the payment of the bill?

“A. Well, we don’t have any fixed rule in regard to that matter, I don’t believe.

“Q. Now, Dr. Blackman, this shows a charge to Mrs. Zoa Zane. How much of the bill did the Greyhound actually pay you for your services?

“Mr. Colegate: That is assuming facts not in evidence, to-wit: That the Greyhound paid him for his services. I don’t know whether that is necessary.

“Mr. Carson: He can answer the question, if it was.”

Mr. Baker: Just a minute, there has already been an objection. The objection, I think, is sound. We object to this question on the grounds that it is assuming a fact not proven in the case; that is, that

(Deposition of Dr. W. H. Blackman.)
the Greyhound Lines actually paid him anything
for the services.

The Court: You may read the answer. [343]

"A. Let's put it this way: The Pacific Greyhound issued a draft in the amount of \$1467.00, payable, if I remember correctly, to Mrs. Zoa Zane, Jack Zane, her husband, Coachella Valley Hospital, and Dr. W. H. Blackman.

"Q. Do you own a part interest in the hospital, here, Doctor?

"A. Yes, sir.

"Q. How much of an interest do you own?

"A. A half interest.

"Q. The Greyhound actually paid you up to the time of the day of the release, for medical services and hospital bills, did they not?

Mr. Baker: We make the same objection, assuming that the Greyhound Lines did pay.

The Court: He may answer.

"A. They paid it in that way, by this draft; but we couldn't have cashed it without their endorsement.

"Q. But nevertheless, they paid it; that is, you got your money in that way?

"A. Yes, sir.

"Q. After that, you received a check for \$140.90 from them direct, did you not?

"A. By check. I think Mrs. Zane wrote the check, if I remember correctly. [344]

"Q. Did you ever discuss at all with Mr. Cam-

(Deposition of Dr. W. H. Blackman.)

eron the question of the payment of the hospital bill, up to the time of the release?

"A. Only in this way: That he assured me they would make every effort to protect us by writing the check payable to all parties concerned.

"Q. Doctor, how long have you handled business for the Greyhound here?

"Mr. Colegate: Excuse me. That is objected to as assuming facts not in evidence.

"Mr. Carson: You can make your objection; but I think he can answer the question.

"Mr. Colegate: Well it is not clear as to what you mean by handling business for the Greyhound. He said he treated their employees.

"Mr. Carson: You went into that directly, and I have a right to cross-examine. I will put the question this way:"

Mr. Baker: That is objected to on the grounds it is assuming a fact not proven in the case.

Mr. Stahl: He made no answer to that, did he?

Mr. Baker: No.

Mr. Stahl: "Q. Doctor, how long have you been treating—that is, people who have been [345] injured in wrecks by the Greyhound—or how many have you treated, and how long have you been treating them?"

"A. Well, ever since I have been in Indio.

"Q. How long has that been, Doctor?

"A. Since September, 1936.

"Q. You have been treating patients—

"A. Some of them.

(Deposition of Dr. W. H. Blackman.)

“Q. For the Greyhound?

“A. Some of them. Not all of them. They are at liberty to go where they please.

“Q. How many patients have you treated during that period of time? Do you have any idea at all, Doctor, how many a year, or how many a month?

“A. No. It is really rather infrequently that we are called on to treat passengers. Probably not even one a month.

“Q. Have you ever treated any patient in any other wrecks except this one?

“A. Yes. There was another bus accident. In fact, I think there were two other bus accidents in which we had groups of people brought in with just minor injuries; nothing serious.

“Q. Taken to the hospital where you own a half interest? [346]

“A. I think, on those occasions also, we received part of the patients, and some probably went to the other hospital.

“Q. May I ask who paid for this? Was it the Greyhound?

“A. I think so. I think some of them have been unpaid, and still are.

“Q. Now, Doctor, in regard to Mr. Cameron’s discussion of a thousand dollars. How did he come to do that, do you remember?

“A. I couldn’t understand that at the time and I still don’t.

“Q. You still don’t understand it?

“A. No.

(Deposition of Dr. W. H. Blackman.)

“Q. Doctor, I assume if he was going to pay the medical bill, if it was unlimited, he wouldn’t have asked such a question, would he?

“Mr. Colegate: That is objected to as calling for a conclusion of the witness, as to what Mr. Cameron may have had in mind.

“Mr. Carson: That is probably right.”

Mr. Baker: That is objected to on the ground that it is argumentative and also calls for a conclusion of the witness.

Mr. Stahl: It was not answered.

Mr. Stahl: “Q. Do you remember the exact [347] conversation you had with Mr. Cameron, what he said in regard to trying to limit the amount to be paid, Doctor?

“A. I don’t remember the exact conversation, except that he made that suggestion, and I told him I couldn’t understand why he should make such a suggestion; that I couldn’t get his viewpoint, or find out what he was driving at, or why.

“Q. Doctor, I notice that in the bill included after time of settlement—what are these charges for—a dollar and a half—do you know what they are for?

“A. Probably for some of the injections of Reticulogen, or liver extract she received. But that is just an assumption. I don’t know for sure. They frequently just make a flat charge for medicines over a period of time. They may have included any other medicine she received.

“Q. Now, Doctor, I think you testified a while ago that Mrs. Zane asked you about the fitting of

(Deposition of Dr. W. H. Blackman.)

an artificial limb. When did you first discuss this artificial limb with her, do you remember?

"A. I don't remember the exact time or date.

"Q. On how many occasions?

"A. Well, I do recall discussing with her the [348] possibility of either waiting until she was able to leave the hospital and letting her go either to Los Angeles, or return to Phoenix, and have an artificial limb fitted; or seeing if we couldn't get some representative from the supply house down here to fit the limb, or take the measurements and have the limb made before she left.

"Q. Who brought that man down from Los Angeles?

"A. So far as I know, he came down by himself.

"Q. How was the knowledge imparted to the representative that she was injured?

"Mr. Colegate: That is, to the extent you may know about it.

"Q. (Mr. Carson) If you do know, Doctor.

"A. We wrote one of the Supply Houses, and I had a conversation with a representative on the 'phone after he had received my letter, relative to it; and they said they would send a man down there.

"Mr. Colegate: Doctor, we would save a little time if you would leave out what somebody told you. That is hearsay. Likewise, leave out your conclusions as to what you thought.

"Mr. Carson: My friend, I can't agree with [349] you on the theory of evidence. I think any conversation he had is clearly admissible in evidence.

(Deposition of Dr. W. H. Blackman.)

"Mr. Colegate: If the question calls for that. For instance, here he recites some hearsay, which simply clutters up the record."

Mr. Baker: We wish to make an objection, Your Honor please, on the ground that it was hearsay.

Mr. Stahl: It was not answered.

Mr. Stahl: "Q. (Mr. Carson) Now, you said you had a conversation on the telephone with him. Did you have a conversation with him yourself, Doctor?"

"A. Yes, sir.

"Q. He came down?

"A. That is right.

"Q. Did you ever suggest to her, Doctor, that she probably could walk, and her hip would be as good as normal, with an artificial limb?

"A. Only indirectly, at the time I mentioned some people did become skilful in the use of artificial limbs.

"Q. Were you in the room when some pictures were shown of some people dancing, when the representative was down here? [350]

"A. I believe I had a folder—at the time we were talking, I think I had a folder advertising a certain type of artificial limb, in which it showed the man sprinting, or dancing, and various stunts with it.

"Q. Mrs. Zane is a very young woman, I think she was 22 years old at the time?

"A. 23 at the time, I believe.

(Deposition of Dr. W. H. Blackman.)

“Q. There was some conversation, though, that she probably could use an artificial limb?

“A. Surely.

“Q. Doctor, assuming there could be a mistake as to the hip being broken, she probably could have worn an artificial limb, could she not, if in truth and fact her hip was fractured at the time, and that would prevent the use of an artificial limb, would it not, if it were fractured, if the hip were fractured?

“A. It would, unless she got union of the fracture. Of course——

“Q. What if a subsequent operation——

“Mr. Colegate: The witness hadn’t finished.

“Q. (Mr. Carson): Go ahead, Doctor.

“A. Of course, if there was non-union, she wouldn’t be able to bear weight.

“Q. What do you mean by ‘non-union?’ [351]

“A. Failure of a fracture to heal.

“Q. Assuming these facts to be true, in this hypothetical question, that there was a graft, bone graft tried to make a union of the hip, or the fracture, and subsequently failed, it would be rather difficult, under those facts, to use an artificial limb, would it not?

“A. Yes; you would still have a non union.

“Q. When there is non union, that socket slips up and down and rotates?

“A. The motion at the fracture point here—this is the head of the femur, and the motion is up

(Deposition of Dr. W. H. Blackman.)
and down here at this point (referring to diagram
in book).

"Q. I understand.

"A. And when the weight comes down, this slides up. An artificial limb could be made with a modification so that a ring comes around here, and a person could still use an artificial limb—but, of course, not as well as though you had a solid union. I might add that in such a hypothetical case, where a bone graft failed to give union, one could resort to a fixation operation which would give a stiff joint, and still allow weight-bearing and the use of an artificial limb.

"Q. That would require a stiffening of the [352]
joint?

"A. More recently, the Army and Navy have removed the head from the socket, and put one of these metal plates over the end of the fractured point, and they claim they are getting weight-bearing and some function with motion.

"Q. She was given back rubs up to the time she left, was she not, alcohol back rubs?

"A. That is part of the daily nursing care.

"Q. I see. On the 3rd day of March you exercised her leg, I think the record shows here, in a chair, knee exercise. A. That is right.

"Q. Doctor, referring to this right here in the chart, on the 9th day of February: What does this mean?

"A. This is that Reticulogen. It is an extract of liver with vitamin B complex, which stimulates blood formation. You very frequently find a per-

(Deposition of Dr. W. H. Blackman.)

son who has lost a great deal of blood, will respond very nicely to that and build their own blood, so you don't have to do quite so many transfusions. Of course, transfusions are of immediate benefit, but it seems to have a tonic beneficial effect in regard to blood formation.

"Q. Doctor, I think you stated a while ago [353] you treat some of the Pacific Greyhound employees here, do you? A. Yes.

"Q. Do they run in here? Some of the drivers stay here?

"A. Yes. That is—I guess you would call it a sort of Division Point. They run from here to Phoenix, I believe, and from here to Los Angeles.

"Q. They are under your medical supervision, some of the drivers, are they?

"A. All of the Pacific Greyhound employees, and all Southern Pacific employees, carry under a plan whereby they have a payroll deduction, and they are entitled to medical care and hospitalization, and the S. P. Hospital Department appoints doctors around various localities on their lines as district surgeons to take care of as much business on the spot so they don't all have to go in to the general hospital in San Francisco.

"Q. Doctor, did you learn anything about the nature of the accident when the patient was admitted?

"A. Yes, from some of the Highway Patrol officers. They told me what had apparently happened—

(Deposition of Dr. W. H. Blackman.)

"Mr. Colgate: Excuse me. I think Mr. [354] Carson means did you learn it from any of the parties to this case. What the Highway Patrol officer said, of course, would be hearsay.

"A. Some of the other passengers on the bus, with minor injuries, told us something of the accident.

"Q. (Mr. Carson): There is an entry here made on admission, 'Injured while riding on a Greyhound bus. Right front portion of bus was demolished when it crashed into the rear end of a truck which it was attempting to pass. Patient suffered severe multiple compound fracture of right foot and ankle, and almost complete traumatic amputation of ankle. Blood supply and nerve supply to foot destroyed by the crushing injury.' 'The admission diagnosis:'—that shows in the history, does it not?

"A. Yes. That is my own writing.

"Q. (Reading):

'1. Traumatic amputation of right foot at level of ankle joint, with compound fractures of both bones of leg at approximately 3 inches above the ankle joint.'

"That must naturally have been a very, very severe accident and severe blow?

"A. Yes. [355]

"Q. Could it have been possible, Doctor, that her knee was—well, put it this way: Would it have been possible for her to have fractured her hip joint in such an accident?

(Deposition of Dr. W. H. Blackman.)

"A. It would be possible, with such a severe trauma. But she certainly would have had some symptoms of such a fracture.

"Q. Did you ever at any time discuss the question of settlement with Mr. Cameron, what she was going to get?

"A. I believe on the day of settlement Mr. Cameron came down here to the office and told me what they had settled for.

"Q. Did he tell you he had given her a draft payable to you and the hospital and somebody else, for over a thousand dollars?

"A. He either came down or called me on the 'phone from the hospital, and told me. I am not sure which. I believe he was down here to the office and said he had left the drafts with them.

"Q. After settlement was made, did you ever see the representative of the artificial limb company trying to fit an artificial limb on the patient?

"A. No.

"Q. Doctor, did you ever assure Mrs. Zane at [356] any time that she would be all right; that she would be able to be a normal person, be a normal wife, and would be able to get around if she had an artificial limb?

"A. Yes, I think I did tell her that I thought she would be able to live a fairly normal life; that she just mustn't be too self conscious about this artificial limb; that if she didn't tell people about it, most of them wouldn't know it, or suspect it.

"Q. Did you ever have any conversation with

(Deposition of Dr. W. H. Blackman.)

her about taking care of the babies, or doing house-work, or doing things like that? Did she ever make any inquiry about that?

“A. No, not specifically, except that as I said a moment ago, I think I did assure her she would probably be able to live a fairly normal life.

“Mr. Carson: I think that is all.”

Mr. Baker: I will read the further Redirect Examination of Dr. Blackman.

(Mr. Baker resumed the witness stand to read the answers; Mr. Whitney reading the questions:)

Mr. Whitney:

“Mr. Colegate: I think I would like to ask this one question which I omitted from the direct. [357]

“Q. Doctor, would the wearing of an artificial leg by Mrs. Zane, and the bearing of weight on it, cause her pain at the site of the fracture, if she had been affected with a fracture of the neck of the right femur at the time she left your care?

“A. Yes, the bearing of weight would cause pain.

“Mr. Colegate: That is all.

“(Stipulated by and between the attorneys for the respective parties hereto that the signature of the witness to the foregoing deposition may be waived.)”

Thereupon the deposition of Mrs. Gladys Payne was read.

“In the District Court of the United States
for the District of Arizona

“Civ. No. 642

“ZOA H. ZANE and JACK ZANE, her husband,
Plaintiff,

vs.

“PACIFIC GREYHOUND LINES, a corporation,
Defendant.

“Deposition of Mrs. Gladys Payne.

“Be It Known, That pursuant to the Stipulation [358] for Taking Depositions, hereto attached, and on the 21st day of February, 1945, at the office of Dr. W. H. Blackman, 519 Miles Avenue, in the City of Indio, County of Riverside, State of California, before me, Charles H. Shaw, a Notary Public in and for said County of Riverside, State of California, duly commissioned to administer oaths, personally appeared Mrs. Gladys Payne, called as a witness by the defense in the above entitled cause, who, being by me duly sworn, was interrogated by Roy W. Colegate, Esq., Attorney for the Defendant; the Plaintiffs being represented at the taking of the within deposition by Terrence A. Carson, Esq., of counsel for Plaintiffs, whereupon the following testimony was taken and proceedings had:

MRS. GLADYS PAYNE,

having been duly sworn by the Notary to tell the truth, the whole truth and nothing but the truth, deposed as follows:

“Direct Examination

By Mr. Colgate:

“Q. Your name is Mrs. Gladys Payne?

“A. Yes.

“Q. You live where, Mrs. Payne?

“A. 421 Oasis, Indio.

“Q. What business or profession do you [359] follow?

“A. I am a practical nurse.

“Q. For what length of time have you followed that profession?

“A. About 12 years.

“Q. Were you associated with the Coachella Valley Hospital here at Indio during the period from December of 1942 until March of 1943?

“A. Yes, I was.

“Q. As a matter of fact, I believe you are still associated with the hospital? A. I still am.

“Q. For what length of time have you been associated with the Coachella Valley Hospital here at Indio?

“A. I started working for them in 1936, but I haven’t worked steady. I have been gone a few months at different times.

“Q. Did you become acquainted with Mrs. Zoa Zane at the Coachella Valley Hospital in December, 1942?

(Deposition of Mrs. Gladys Payne.)

"A. I was on duty then. That is when she came into the hospital.

"Q. I believe that was on December 10, 1942. Do you recall the date, Mrs. Payne?

"A. I believe it was the 10th or 11th. [360]

"Q. Were you there at the Hospital from that time on until Mrs. Zane left, which I believe was on March 8, 1943? A. Yes, I was.

"Q. In what capacity were you at the hospital during that period?

"A. Well, I do general duty, floor duty there.

"Q. Were you on duty each day during that period?

"A. Six days a week. I just work six days a week.

"Q. During that period from December 10, 1942, until March 8, 1943, you were on duty six days each week? A. Yes, I was.

"Q. During what hours, Mrs. Payne? Can you tell us?

"A. As well as I remember, I worked all that time from 7:00 until 3:00. Sometime we have to change shifts, but I can't remember changing any at that time.

"Q. During that period what, if any, services or attention did you render to Mrs. Zane at the hospital?

"A. Well, some mornings—not every morning—we don't have the same patients every morning; we [361] change around different rooms—but some mornings I bathed her, and rubbed her back and changed her linen.

(Deposition of Mrs. Gladys Payne.)

"Q. Did you also have occasion to assist her in using bedpans and things of that kind?

"A. I did.

"Q. You said you changed around so that on different days you took a different group of patients?

"A. That is the way we do, yes.

"Q. How frequently during that period did you have Mrs. Zane in your group of patients?

"A. Well, I couldn't say definitely, because I can't remember.

"Q. Would it be a third of the time, or a fourth of the time, or half of the time? In other words, how many groups of patients did you alternate between during that period?

"A. Well, we usually have about three; but I just couldn't say definitely what portion of the times I would have her.

"Q. Would you say you had her as much as one-fourth of the time? A. Yes, I would.

"Mr. Carson: I think this is leading.

"Q. (Mr. Colegate): Tell us, if you can, any [362] portion or range of portions of time you had her in your group?

"A. I could tell by looking on the chart. Every one of us has a chart for our patients—what we did for them, and I can tell my handwriting. The 1st of January, 1943, was the first day I took care of her here (referring to chart).

"Q. From that time until March 8, 1943, can you estimate what part of the time you attended

(Deposition of Mrs. Gladys Payne.)

Mrs. Zane? In other words, what part of your six days each week was she under your care?

"A. Well, I would probably have her one day during the week for her bath and morning care; but during the day, why, any time her—if she wanted a bedpan or anything, we would answer it.

"Q. As I understand it, she was in the group of patients you cared for probably one day each week?

"A. Yes.

"Q. In addition, you sometimes served her as floor nurse when she rang her bell?

"A. Yes, that is right.

"Q. Are you acquainted with Mr. William Cameron, Mrs. Payne?

"A. That is the man, the Adjuster that came to see her? [363]

"Q. Yes. Do you know who he is when you see him?

"A. No, I wouldn't remember him.

"Q. Were you present at any time that Mr. Cameron engaged in any conversation with Mrs. Zane there at the hospital?

"A. No, I don't recall any.

"Q. During the course of your acquaintance with Mrs. Zane there between January and March of 1943, what, if any, care or treatment did you render to her right leg?

"A. Well, when her bed was changed, her underneath sheets, it would always take two to do that. One would have to hold the leg and move the pil-

(Deposition of Mrs. Gladys Payne.)

lows—her leg was propped on pillows—while the other one changed the underneath sheets.

“Q. Besides that, what, if any, treatment or care did you give to her right leg or right knee during that period? By that I mean to include any manipulation or anything that would cause you to move her right leg. Will you tell us what, if anything, there was of that kind?

“A. After she was able to sit up, each day—I won’t say each day, either—but at intervals the Doctor would ask us to exercise that leg, bend the knee and move it around when she would be in a chair. [364]

“Q. You say ‘in a chair.’ What chair is that? A wheel chair?

“A. Sometimes she would be in a wheel chair, and sometimes we would just have her in an easy chair we have there. She would sit in that.

“Q. Can you tell us approximately when it was that the Doctor requested this exercise to the right leg, that is, more than just between the 1st of January and the 8th of March? Can you tell us more exactly the date?

“A. No, I couldn’t tell. I suppose it is on the chart here.

“Q. During that time did you ever personally perform any of that exercise to the right leg?

“A. Not while she was in bed, no. We always have the surgeon nurses that do those things.

“Q. Did you ever do so when she was out of bed, in the chair?

(Deposition of Mrs. Gladys Payne.)

"A. I have seen her, yes, when she would be in the chair. We would encourage her to, and help her move that leg.

"Q. Did you personally ever take hold and move the leg?

"A. I can't remember of doing so.

"Q. How many occasions were you present when [365] the right leg of Mrs. Zane was exercised, between January 1st and March 8th, if any?

"A. Well, I was present several times. I couldn't say how many.

"Q. Well, you have said several. Can you tell us some range of numbers? In other words, somewhere between particular figures?

"A. No, I really couldn't. I don't know if we put on the chart each time or not that they were exercised.

"Q. Do I understand you to say there were some times when you were present that that was done? A. Yes.

"Q. What, if anything, did Mrs. Zane state at those times that this right leg was moved and exercised?

"A. Well, it seems as though the pain was more in her knee, in moving the knee,—it was straight for so long.

"Q. Do you mean that is what she said?

"A. That is all I can recall her complaining of.

"Q. Now, what is all you can recall her complaining of?

(Deposition of Mrs. Gladys Payne.)

“A. Of soreness, or pain in her knee when it was moved. [366]

“Q. Do you remember any other statements she made at the times of those exercisings of the right leg?

“A. No, I can’t.

“Q. What, if anything, did she say at these times regarding pain in the knee, you have just mentioned?

“A. Well, her knee was—her leg had been straight, you know, just laid out straight for I don’t know just how long, but weeks, and her knee was more or less stiff, not bending.

“Q. All right. But the question is, Mrs. Payne, what she stated on those occasions with regard to the knee. What did she say when the knee was exercised?

“A. Well, I can’t remember what she said, but I know it was more or less painful to her in the knee when it was bent. When you bend the knee, why, she seemed to have pain in it.

“Q. What do you mean by ‘it’?

“A. In the knee.

“Q. What, if any other complaints, did Mrs. Zane make upon those occasions when the leg was exercised?

“A. I can’t remember any other pain—of her [367] complaining of any other pain when she was exercised—when her leg was exercised.

“Q. Was Mrs. Zane fitted with any artificial

(Deposition of Mrs. Gladys Payne.)

limb during the time that you knew her there at the hospital?

"A. Yes, she was.

"Q. About when was that?

"A. Just two or three days before she left the hospital.

"Q. What was the nature of the artificial limb that she was fitted with at that time?

"A. Well, it fit up over the stump and came clear up to her hip, braces of some kind, and a strap was around her waist.

"Q. You mean it was an artificial right foot?

"A. Yes.

"Q. To what extent, within your personal knowledge, did Mrs. Zane make use of that artificial member?

"A. Well, when he fitted that to her stump, she stood up with the aid of her crutches.

"Q. Subsequent to that, tell us to what extent you saw Mrs. Zane walk about with that artificial leg, if any?

"A. I didn't see her walk on it without crutches; but she did walk on it with her crutches.

"Q. On how many occasions did you see her do that?

"A. Just this one day. It evidently didn't fit right, and he had to have it readjusted.

"Q. What, if any, statements did Mrs. Zane make at the time you saw her walk with that artificial foot?

(Deposition of Mrs. Gladys Payne.)

“A. She stated that the stump was still tender when she bore her weight on it.

“Q. Did she make any other complaints at that time?

“A. I don’t remember any.

“Q. Did you take any part in assisting Mrs. Zane to walk at that time?

“A. No; I was just in the room and saw her. She just took a few steps with the artificial leg.

“Q. That was the only time you saw Mrs. Zane make use of the artificial limb, is that right?

“A. That is the only time.

“Mr. Colegate: That is all.

“Cross Examination

“(By Mr. Carson.)

“Q. Do you remember how often Mr. Cameron used to come to the hospital, Mrs. Payne?

“A. No, I don’t know how often. [369]

“Q. Quite often, was it not?

“A. Well, I couldn’t say, because I just don’t remember.

“Q. You saw him there a number of times, did you not?

“A. I did.

“Q. A number of times at the hospital he would come in and talk to her when he came over?

“A. Yes, he came in and talk to her.

“Q. What day did you say you started to work, Mrs. Payne?

(Deposition of Mrs. Gladys Payne.)

"A. On the 1st of January,—no,—that was the first time I gave her her morning care.

"Q. What date was it?

"A. The 1st of January.

"Q. I notice in here she had morphine. Do the nurses give injections of morphine?

"A. Yes, sir.

"Q. Did you have orders to give her morphine?

"A. Not being a registered nurse, I didn't give the medications.

"Q. But the nurses do give morphine?

"A. Yes, on the doctor's order.

"Q. It shows there was morphine given her along a number of times in January. If the chart recites that morphine was given, it was given, is [371] that correct?

"A. That is right.

"Q. Did she ever complain to you of pain in her back? The chart reads she did complain of pain in her back. Is that right? Do you remember that, Mrs. Payne?

"A. I can't remember.

"Q. But if the chart recites it, she complained of it, of course?

"A. Yes.

"Q. Now, she did complain of pain in her knee, is that right?

"A. Yes, she did. When we would bend it, or she would bend her knee, she complained of pain.

"Q. When she would bend the knee, she would complain of pain?

(Deposition of Mrs. Gladys Payne.)

"A. Yes.

"Q. Did it seem to be quite severe?

"A. Well, at first it was more severe than it was later, after she got used to bending it.

"Q. Do you remember of giving her, quite often, alcohol rubs for her back?

"A. She complained of her back.

"Q. Do you remember any occasions you gave her alcohol rubs for her back?

"A. We have routine morning and evening rubs. [371]

"Q. Did she ever say, after she had some of those, it relieved some of the pain in her back?

"A. Yes, it always makes them feel better in the back.

"Q. Did you ever hear any discussion between her and Mr. Cameron that Mr. Cameron thought she would get along all right after she got out of the hospital?

"A. I can't remember any conversation between her and Mr. Cameron.

"Q. Do you remember any conversation, or did you talk to her any about it, after Mr. Cameron came in to see her, if a man from the Artificial Limb Company had come down to fit her, and that Mr. Cameron had said something about that she probably could wear an artificial limb, or she would be all right? Do you remember any conversation with Mrs. Zane about that?

"A. Yes. She told me that she was getting an artificial leg, and she seemed to be enthused over it.

(Deposition of Mrs. Gladys Payne.)

"Q. Did she say anything about Mr. Cameron saying that she would be all right if she got the artificial limb—that is, as to what Mr. Cameron told her?

"Mr. Colegate: That is objected to as being [372] hearsay, what Mrs. Zane may have told this lady.

"Mr. Carson: That may be. You can make your objection."

Mr. Baker: That was objected to and we object on the ground it assumes a fact not in evidence. It does not make any difference to whom she talked.

Mr. Whitney: She didn't answer.

"Q. But did she ever tell you, Mrs. Payne, that Mr. Cameron had said she would be all right if she got an artificial limb? Do you remember?

"A. I don't remember her saying that.

"Q. You don't remember of her saying that?

"A. No, I don't.

"Q. Do you remember of her saying she had talked it over with Dr. Blackman, anything about the matter of an artificial limb?

"Mr. Colegate: All these questions are objected to as hearsay.

"Mr. Carson: We have an entirely different theory on that. I think it is very competent, under the issues. What was the question?

"(Last question read by the reporter.)

"Q. (Mr. Carson) Do you remember any such conversation, Mrs. Payne?

(Deposition of Mrs. Gladys Payne.)

"A. I can't remember her saying anytinhg to me. [373]

"Q. When she would talk with you about getting an artificial limb, who did she say she had talked with about getting an artificial limb, do you remember.

"Mr. Colegate: Objected to as assuming something not in evidence.

"Mr. Carson: She has testified she did talk with somebody about getting an artificial limb.

"Q. Did she ever tell you who she had talked with about getting an artificial limb, with anyone—Dr. Blackman, or Mr. Cameron—or who did she say she had talked with about getting an artificial limb?

"Mr. Colegate: If she did say that?

"Mr. Carson: If she did have such a conversation.

"Q. You have stated she said something about getting an artificial limb. Do you remember who she said she had talked with?

"A. Well, I don't remember who she had talked to about it.

"Q. Did you ever hear Mr. Cameron talk with her about settling the case, in her room?

"A. No.

"Q. You never remember of hearing a conversation in the Hospital between Dr. Blackman and Mr. [374] Cameron about how much the doctor bill was going to be, did you?

"A. No, I didn't.

(Deposition of Mrs. Gladys Payne.)

"Q. Did she ever inquire of you whether Dr. Blackman was a very competent surgeon or not?

"A. No, I don't believe she did.

"Q. Did you give back rubs and alcohol rubs to all the patients in the hospital of an evening?

"A. We do, especially the bed patients.

"Q. Do you remember along about the first of February, or the latter part of January she was given some sulfa drugs? Do you remember that—or do you?

"A. No. I never give the medicine, so I wouldn't know.

"Q. Will you look at this chart? What are these two drugs given right here? That is on February 1st. What is that drug there?

"A. That is Sulfathiazole.

"Q. Do you know what kind of a drug that is? That is one of the sulfa drugs?

"A. Yes, it is.

"Q. What is this down here?

"A. B and C Phosphate.

"Q. What date is that right here: February 5th? [375]

"A. Yes.

"Q. Some sulfa drugs given on that?

"A. No. That is Sulfathiazole ointment to the dressing.

"Mr. Carson: I think that is all.

"Mr. Colegate: Thank you, Mrs. Payne.

"(Stipulated that the signature of the witness in the foregoing deposition named may be waived.)

“State of California,
“County of Riverside—ss.

“I, Charles H. Shaw, a Notary Public in and for said County of Riverside, State of California, do hereby certify that the witnesses in foregoing Depositions named, to-wit: Dr. W. H. Blackman, and Mrs. Gladys Payne, were by me duly sworn to testify the truth, the whole truth and nothing but the truth;

“That said Depositions of said witnesses were taken at the time and place heretofore mentioned in the annexed Stipulation for Taking Depositions, to-wit: on the 21st day of February, 1945, at the office of Dr. W. H. Blackman, 519 Miles Avenue, in the City of Indio, County of Riverside, State of California, before me, Charles H. Shaw; [376]

“That said Depositions of the foregoing witnesses named were taken down in shorthand by me, Charles H. Shaw, and were thereafter transcribed into typewriting; and that by stipulation by and between the attorneys for the respective parties to the foregoing cause, the signatures of the above named witnesses to the foregoing depositions were waived.

“I further certify that I am not attorney or relative of either party to the foregoing cause, or clerk or stenographer of either party, or of their respective counsel, and am in no wise interested in the subject matter of the above entitled cause.

“In Witness Whereof, I have hereunto sub-

scribed my name and affixed my seal of office this 5th day of March, 1945.

“[Seal] CHARLES H. SHAW,
“Notary Public in and for the County of Riverside,
State of California.”

Mr. Baker: We offer this in evidence, or the deposition, rather, of Alpha Marcum.

Mr. Stahl: No objection. It won't be necessary to read that stipulation unless you want to.

Mr. Baker: All right.

(Mr. Baker then assumed the witness stand to [377] read the answers contained in the deposition; Mr. Whitney reading the questions.)

“In the District Court of the United States
For the District of Arizona

“Civ. No. 642

“ZOA H. ZANE and JACK ZANE, her husband,
Plaintiff,

vs.

“PACIFIC GREYHOUND LINES, a corporation,
Defendant.

“Deposition of Alpha Marcum, taken on behalf of defendant, at 428 Bartlett Building, Los Angeles, California, at 10:00 o'clock a. m., February 20, 1945, before P. S. Noon, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed stipulation.

“Appearances of Counsel:

“Bryce P. Gibbs, Esq., for defendant.

“Terrence A. Carson, Esq., for plaintiffs.

“ALPHA MARCUM

“having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and testified as follows: [378]

“Direct Examination

“By Mr. Gibbs:

“Q. Will you state your full name, please?

“A. Alpha R. Marcum.

“Q. Are you married or single?

“A. Single.

“Q. What is your age, please? A. 55.

“Q. What is your present residence?

“A. San Fernando.

“Q. What is your occupation at the present time?

“A. Registered nurse, working with the War Food Administration.

“Q. On December 10th and 11th, 1942, where did you reside? A. Indio.

“Q. What was your occupation there?

“A. Superintendent of the Coachella Valley Hospital.

“Q. How long had you been employed there prior to that time?

“A. I went there in the fall of 1940.

(Deposition of Alpha Marcum.)

“Q. During all of that time you were superintendent of the hospital? A. I was. [379]

“Q. Do you recall now how many nurses were in the employ of the hospital there in December, 1942?

“A. I do not recall the exact number. There were possibly eight or nine.

“Q. You recall the case, do you not, in which Mrs. Zane was brought into the hospital for attention, when she had been on a bus and was injured near Indio?

“A. I recall a woman coming in, yes.

“Q. You do not know what time she got into the hospital, do you? A. I do not.

“Q. But you remember the occasion?

“A. Of her being brought in, yes.

“Q. Do you know of your own knowledge now the extent of her injuries at the time you first saw her?

“A. Other than the injury to the foot I recall nothing.

“Q. Did you have anything whatsoever to do personally with treating her or arranging for her treatment?

“A. Not other than assigning each day the nurse to take care of her. That was one of my duties, to assign the nurse to take care of Mrs. Zane. [380]

“Q. Do you now remember who you assigned to the case?

(Deposition of Alpha Marcum.)

"A. I do not, because nurses come and go too fast.

"Q. There was a record kept of the nurses working on the case, was there?

"A. The initials would be on the chart.

"Q. Was that chart kept under your direct supervision?

"A. All charts are in hospitals.

"Q. That is, they were kept under your supervision as superintendent of the hospital?

"A. Yes.

"Q. At any time while Mrs. Zane was in the hospital did you examine her, or were you present at any time when any nurse did examine her, or treat her?

"A. Well, frequently I went into the room when she was being given nursing care.

"Q. Did you have occasion at any of those times to observe her right limb?

"A. The right limb? I don't recall there being any occasion for any observation, no.

"Q. Were you present when an amputation of her right foot was performed?

"A. I don't recall whether I was in surgery or not.

"Q. You do not recall whether you were present at any time during the operation?

"A. I do not.

"Q. At any time while you were there in the hospital as superintendent did you yourself personally have any conversation with Mrs. Zane?

(Deposition of Alpha Marcum.)

"A. Not other than to say 'Good morning; are you comfortable; is your foot all right; do you have the things you need?'

"Q. Did she at any time make any complaint to you about any injury other than the injury below the right knee?

"A. Any injury below the right knee?

"Q. I mean the injury which made it necessary to amputate the foot.

"Mr. Carson: She probably did not understand your question, Mr. Gibbs.

"Mr. Gibbs: Q. Well, it was necessary to amputate her right foot, was it not?

"A. Yes. I remember the woman was in very severe shock.

"Q. Do you know whether she was conscious or unconscious when she first came to the hospital?

"A. I do not. I am sure the operation was necessary or it would not have been done. [382]

"Q. Do you know how long after she reached the hospital the amputation was performed?

"A. I do not recall.

"Q. Do you know who were present in the room when the amputation was performed?

"A. I do not, because I don't recall being in surgery at that time at all.

"Q. Do you know who the surgeon was who took care of Mrs. Zane's case?

"A. It would be Doctor Blackman or Doctor O'Connell. I am inclined to think it was Doctor Blackman.

(Deposition of Alpha Marcum.)

"Q. After the operation had been performed did you ever see any of the nurses trying to assist Mrs. Zane in walking?

"A. Yes, when she was convalescing she was given crutches and the nurses assisted her, they assisted her in getting up in the chair and in trying to teach her to use crutches.

"Q. Did Mrs. Zane at any time make any complaint about any injury to her right hip?

"A. Not that I recall at all.

"Q. What was her condition when she left the hospital.

"A. She was in very good condition, excepting that the woman was very, very clumsy, and was very [383] timid about trying to help herself in any way, and I had cautioned the nurses, I remember, about helping her, to see that she did not fall, because she was so clumsy with the use of her crutches.

"Q. Do you know of her ever having fallen at the hospital while she was there?

"A. I feel sure she never fell while she was there.

"Q. Did you meet her husband while she was in the hospital?

"A. Yes, ever so many times.

"Q. Did he have anything to say about her injuries to you personally?

"A. As I remember it he was a very disagreeable individual. He was always putting in long

(Deposition of Alpha Marcum.)

distance calls and talking for indefinite periods, and he sounded to me as if he was a very——

“Mr. Carson: I believe that answer is irrelevant.

“Mr. Gibbs: Read it.

“(The answer was read by the reporter.)

“Mr. Gibbs: That all may go out as being incompetent and immaterial.

“Q. I mean did he ever make any statement to you or in your presence concerning his wife's injuries while she was at the hospital? [384]

“A. No, not that I recall.

“Q. Did you meet Mr. Cameron while Mrs. Zane was confined in the hospital? A. Yes.

“Q. Did you see him there on many occasions in connection with this case?

“A. Mr. Cameron was there several times, I am sure, about this case, or concerning it.

“Q. Were you present at any time when negotiations for a settlement took place?

“A. I went into the room with Mr. Cameron when he presented the two checks to Mr. and Mrs. Zane.

“Q. Did you witness the settlement?

“A. Yes.

“Mr. Gibbs: Counsel, will you look at this, please (indicating)?

“Mr. Carson: Is that the original or a copy?

“Mr. Gibbs: That is a copy of the original. I haven't the original here. I just want to identify

(Deposition of Alpha Marcum.)

her signature on what purports to be a copy of the release.

“Mr. Carson: Are you going to offer this in evidence?

“Mr. Gibbs: I want to offer this as a copy of the original. I haven’t the original. That will [385] be produced at the trial.

“Mr. Carson: Will you vow that this is a true and correct copy?

“Mr. Gibbs: Well, I had nothing to do with it, of course. I will ask the witness to examine it.

“The Witness: I know that’s my signature.

“Mr. Carson: That is your signature?

“The Witness: Yes, that’s my signature, absolutely.

“Mr. Gibbs: Q. You were present when Mr. and Mrs. Zane signed this?

“A. Yes.

“Q. That is what you were there for, was it, for the purpose of witnessing their signatures?

“A. To witness their signatures, yes.

“Q. This is a release which purports to state on the face of it that it covers a settlement in the sum of \$15,967.00; is that correct? A. Yes.

“Q. Is that a carbon copy of the instrument which you signed at that time?

“A. As far as I can recall, yes. It looks to me to be the very same thing.

“Mr. Gibbs: With the understanding that the original will be produced at the time of trial, I [386]

(Deposition of Alpha Marcum.)

will offer this now, and ask that it be attached to the deposition.

“Mr. Carson: Yes. If that is a true and correct copy of the original, and that is her signature, all right. It is subject, of course, to producing the original at the trial.

“Mr. Gibbs: Yes.

“Mr. Carson: That is your signature, and that is a true and correct copy of the original?

“The Witness: Absolutely. It's my signature, anyway.

“Mr. Gibbs: Will you mark this, please?

“(The instrument in question is annexed hereto, marked Defendant's Exhibit A by the Notary Public.)

“Mr. Gibbs: Q. You saw Mr. and Mrs. Zane sign that?

“A. Yes, I am quite sure I did.

“Q. They signed it in your presence?

“A. It seems to me they did, yes. I took a bottle of ink in there for them to sign it.

“Q. As I understand it, at no time did you make any examination personally of Mrs. Zane's injuries? A. No.

“Q. You never gave her any treatment of any kind while she was at the hospital? [387]

“A. No.

“Q. That was given by some assistant of yours?

“A. It was. A superintendent doesn't do those things.

(Deposition of Alpha Marcum.)

“Q. And you would not know what nurses did that unless you had the chart; is that correct?

“A. Yes, that's right.

“Q. Did Mrs. Zane at any time while she was at the hospital, before she left there, make any complaint to you about any injury to her right hip?

“A. Not that I recall.

“Mr. Gibbs: You may cross-examine.

“Cross-Examination

“By Mr. Carson:

“Q. I believe Mrs. Zane went in the hospital on December 11th, and that she was injured on the 10th.

“Mr. Gibbs: The night of the 10th, and was taken to the hospital on the 11th, I believe. I don't remember the hour she got there; I have no record of it myself.

“Mr. Carson: Q. At any rate, the amputation took place when, if you remember?

“A. I don't recall.

“Q. Do you remember the approximate time she [388] left the hospital?

“A. No. Patients came and went too fast for me to remember.

“Q. There were quite a few other patients brought in along with her from that bus accident, were there not?

“A. I think there were.

“Q. Probably four or five?

“A. I am not sure of the number.

(Deposition of Alpha Marcum.)

"Q. Doctor Blackman handled considerable business for the Greyhound, did he not, that is, patients that came into the hospital there?

"A. He did.

"Q. Does he own an interest in the hospital there at Indio?

"Mr. Gibbs: If she knows of her own knowledge.

"Mr. Carson: Q. Yes, if you know of your own knowledge.

"A. Doctor Blackman, Doctor O'Connell and Dr. Pawley own the hospital.

"Q. You say you saw the claim agent over there, and was he around the hospital considerably?

"A. Only when it was necessary.

"Q. He was over there probably on an average once or twice a week while Mrs. Zane was in the hospital; is that right? [389]

"A. I don't recall Mr. Cameron being there that often, although he always took care of the needs of the patients very nicely, I will say that.

"Q. I believe the records show, Miss Marcum, that this lady was in the hospital almost three months. Isn't it just a little unusual for a case of an amputated leg to stay in the hospital that long?

"A. It all depends upon the condition of that leg.

"Q. The condition of the leg?

"A. Absolutely—or the foot.

(Deposition of Alpha Marcum.)

"Q. Do you know whether or not the right hip was X-rayed?

"A. I don't recall. I do not recall there being any need for it being X-rayed, or there ever being any complaint about the right hip in any way.

"Q. You were superintendent of nurses?

"A. I was superintendent of the hospital.

"Q. Superintendent of the hospital?

"A. Yes.

"Q. You say you had about eight nurses there?

"A. Yes.

"Q. What hours did those nurses work?

"A. Eight hour shifts; 7:00 to 3:00, 3:00 to 11:00, 11:00 to 7:00. [390]

"Q. Do you remember shortly after the accident some of the patients were taken to a hospital in Los Angeles?

"Mr. Gibbs: Objected to as immaterial.

"Mr. Carson: Well, do you know anything about an occasion when it was suggested by Mrs. Zane's husband that the case was rather serious and he thought she ought to be taken to a hospital in Los Angeles; do you remember anything about that?

"A. I don't recall anything to that effect.

"Q. I think you stated a while ago, Miss Marcum, that Mrs. Zane was in rather a serious condition of trauma or shock when she was brought to the hospital?

"A. Yes.

"Q. Will you just describe her condition then?

(Deposition of Alpha Marcum.)

"A. As I recall it she was very much in shock, as anyone would be from an injury like that.

"Q. The right leg had been mangled, had it not?

"A. The foot, as I recall, because it was the foot that was amputated.

"Q. Do you remember something about her being fitted with an artificial limb after she got her settlement?

"A. I have a hazy remembrance of the representative of some surgical appliance company coming [391] down there to see her.

"Q. She was in the hospital approximately three weeks after the case was settled, and do you remember that a few days or a week after the settlement was made there was some gentleman who fitted her for an artificial limb?

"A. As I say, I have a hazy remembrance of some representative coming to see her concerning an artificial limb, but when or who it was I have no recollection.

"Q. Do you remember any conversations at the hospital between Doctor Blackman and Mr. Cameron, the claim agent for the Greyhound?

"A. I do not.

"Q. You do not?

"A. No.

"Mr. Carson: I think that is all.

"Mr. Gibbs: That is all.

"(It was stipulated and agreed by and between counsel that signature by the witness to the fore-

(Deposition of Alpha Marcum.)

going deposition is waived, and that it shall possess the same force and effect as though read and signed in the presence of the Notary Public before whom it was taken.) [392]

“State of California,

“County of Los Angeles—ss.

“I, P. S. Noon, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

“That prior to being examined the witness whose signature is affixed to the foregoing deposition Alpha Marcus, was by me sworn to testify the truth, the whole truth and nothing but the truth;

“That the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction;

“That when reduced to typewriting it was read by or to the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and was thereupon signed by the said witness in my presence.

“I further certify that I am not interested in the event of the action.

“Witness my hand and seal this 23rd day of February, 1945.

“P. S. NOON

“Notary Public in and for the County of Los Angeles, State of California.” [393]

Mr. Baker: The exhibit here attached, which she identified, is the same, if you want to look at it, gentlemen. It is very apparent that it is a carbon copy of the original that was put in evidence.

(This document was received in evidence as Defendant's Exhibit AG.)

Mr. Baker: Will the Court grant a recess at this time, please? I would appreciate it if you will.

The Court: We will suspend until 10 in the morning. Keep in mind the Court's admonition.

Thereupon a recess was taken at 4:40 o'clock P. M. of the same day. [394]

Ten o'clock A. M. May 22, 1945, all parties as heretofore noted by the Clerk's Record being present, the trial resumed as follows:

The Court: You may proceed.

Mr. Baker: I'd like to recall Mrs. Zane for four or five questions which I omitted to ask, your Honor please.

The Court: Very well.

ZOA H. ZANE

resumed the witness stand and testified further as follows:

Re-cross Examination

Mr. Baker:

Q. Mrs. Zane, when we were interrogating you with reference to the checks contained in Defend-

(Testimony of Zoa H. Zane.)

ant's Exhibit AD, we were hunting for a check to Milligan & Company and could not find it at the time. I hand that to you. Is that your check?

A. Yes.

Q. And this Milligan & Company are the people that prepared or made your artificial limb in Los Angeles, California?

A. Yes, sir.

Q. And this check is in full payment of the amount of that bill, is that correct?

A. Yes, sir. [395]

Q. And it is dated March 5th, 1943?

A. Yes.

Q. And that check is upon your Indio bank?

A. Yes, sir.

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was received as Defendant's Exhibit AH in evidence.)

(Thereupon Defendant's Exhibit AH was read to the jury by Mr. Baker.)

Mr. Baker: You testified about some services performed for you after you arrived at Phoenix by the Arizona Brace Shop? A. Yes, sir.

Q. That is a concern that also deals in artificial limbs, isn't that true, here in Phoenix?

A. Yes, sir.

Q. I hand you a check dated June 16th, 1943, payable to the Arizona Brace Shop. Is that in

(Testimony of Zoa H. Zane.)

payment for some services in connection with that artificial limb?

A. Yes, it was for a leather shrinker. That is a device put on the end of my leg to shrink it down so I could wear an artificial leg.

Q. That is the same limb that was furnished you by the Milligan Company in Los Angeles? [396]

A. Yes, the one they furnished me that fitted me up too soon. My stump was not prepared.

Mr. Baker: We offer this in evidence.

Mr. Stahl: No objection.

(The document was marked as Defendant's Exhibit AI in evidence and read to the jury by Mr. Baker.)

Mr. Baker: I hand you another check, payable to the Arizona Brace Shop, Mrs. Zane, and ask you is that for some services in connection with that same artificial limb?

A. Yes, sir. After they had got my stump shrunk, why, they started rebuilding a shaft of the leg and they were to charge me seventy-five or fifty dollars, I don't remember now how much, and the \$25.00 was deposited on the work that they were to do on it.

Mr. Baker: We offer this in evidence.

Mr. Carson: All right.

(This document was marked as Defendant's Exhibit AJ in evidence and read to the jury by Mr. Baker.)

Mr. Baker: I hand you another check to the

(Testimony of Zoa H. Zane.)

Arizona Brace Shop. Was that also for services in connection with this same artificial limb?

A. Yes; but I don't remember what. [397]

Q. You don't remember what it was?

A. No.

Q. Might that have been something in connection with the crutches you have or the artificial limb? A. That may have been.

Mr. Baker: We offer this in evidence.

Mr. Carson: No objection.

(This document was received as Defendant's Exhibit AK in evidence and read to the jury by Mr. Baker.)

Mr. Baker: Now I believe, Mrs. Zane, that-- I am not sure, it might have been in the deposition, so if I mis-state it you can correct me—I believe you testified that you had some conversation with this Arizona Brace Shop here in Phoenix after you arrived in Phoenix concerning your leg. Is that true or not, or am I mistaken?

A. That I had had some conversation with the Arizona Brace Shop?

Q. Yes. A. After receiving my leg?

Q. Yes, here in Phoenix.

A. Yes, after trying to use it for a week or so, why, I went to the Brace Shop here to see if they could teach me how to use it. [398]

Q. And what did they do in that respect?

A. Well, they said at the time they thought it was too short, and Mr. Aunger looked at my stump

(Testimony of Zoa H. Zane.)

and said I had been fitted up too soon, that my stump was not even healed up, let alone shrunk.

Q. What did you do in that respect, concerning the artificial limb then?

A. Well, they told me not use it any more until my stump had been shrunken and healed. He said it was doing more harm than good.

Q. So their theory was you had been fitted too soon in Los Angeles; your stump had not been properly shrunk, is that correct? A. Yes.

Q. Did they make any reference to your hip?

A. No. At that time, why, they just looked at my stump and told me I was not ready to wear a limb yet.

Q. As I understand it, Mrs. Zane, you at no time before the date this suit was filed, which was December 9th, 1944, notified the Pacific Greyhound Lines that there was any difficulty in your hip?

A. No.

Q. And you made no demand upon them, is that correct? [399] A. That is right.

Q. Not until the suit was filed, is that correct?

A. Well, I don't know. I turned it over to my attorney.

Q. As far as you are concerned, you made no demand? A. No.

Mr. Baker: I think that is all.

Re-direct Examination

Mr. Stahl:

Q. Now, Mrs. Zane, this conversation you relate

(Testimony of Zoa H. Zane.)

you had with the Arizona Brace Shop regarding the stump, then what did you do after that; did you have any other talks with them after that?

A. Yes, from time to time.

Q. I mean, did you go back to them again?

A. Yes, from time to time I would go back and they would examine the stump to see if it was ready to be fitted for an artificial limb.

Q. Then what?

A. Well, the first day I was there Mr. Aunger gave me a wide elastic band. It was to wrap around my leg to take the swelling out, and then later, after it had done its work, why, then he fitted me [400] up with this leather, which is a leather shrinker, and after wearing it for a while, why, they started to work on my limb, the artificial limb.

Q. Then did you wear it?

A. Well, I dragged it around for a while, but I couldn't support any weight on it.

Q. Did you go back to them?

A. Yes. The last time I was down there, Mr. Aunger suggested maybe there was something the matter with my hip and suggested that I have X-rays made.

Q. That is what led you to have the X-rays taken? A. Yes.

Mr. Stahl: That is all.

Mr. Baker: No further questions.

(The witness was excused.)

Mr. Baker: The defendant rests.

Mr. Stahl: Except for the mortality table, Mr. Baker has agreed we can put that in. I have shown it to him and he says it is all right. I guess, without re-opening, I could read it. The American Experience Table on mortality shows that the life expectancy of a person 23 years of age is 40.17 years.

Mr. Baker: The defendant desires to make a [401] motion in the absence of the jury, may it please the Court. I understand the plaintiffs have rested?

Mr. Stahl: Yes.

The Court: All right. (Addressing the jury) You may retire from the courtroom, gentlemen. I will excuse you until 11 o'clock, gentlemen. We have to settle these instructions. Keep in mind the Court's admonition.

Thereupon the jury retired from the courtroom.

Mr. Baker: If the Court please, both sides having rested and the evidence has been closed, therefore, at the close of the testimony the defendant moves the Court to instruct a verdict in favor of the defendant, on the grounds and for the reasons that the evidence adduced at the trial of this cause does not show or prove a cause of action in favor of the plaintiff, in that: First, it affirmatively appears from the testimony that a due, proper and legal release has been executed by the plaintiffs; second, that such release covers not only known, but unknown injuries, and all suspected and unsus-

pected injuries resulting from the bus accident in question and also waives all benefits of Section 1542 of the Civil Code of California; three, that there is no evidence [402] showing any intentional fraud upon the part of the defendant; four, that there is no evidence showing any constructive fraud on the part of the defendant; five, that there is no evidence showing mutual mistake sufficient to void the release; six, that if any such constructive or intentional fraud does appear, that the release covers the same and the plaintiffs cannot recover in view of the terms of the release; seven, that it affirmatively appears from the evidence that the plaintiffs have not offered a restitution of the benefits received by them from the defendant on account of the release; eight, that in the complaint the plaintiffs allege an excuse for not offering restitution to the defendant on the ground that the plaintiffs have expended their monies in the treatment and the cure of her troubles caused by a fractured hip; nine, the evidence shows conclusively that that is not true, that the money has been expended for other purposes and, therefore, there has been no proper offer of restitution; ten, it further appears from the evidence that the plaintiffs were notified of the fractured hip and the alleged falsity of the representations made to them at the Indio Hospital, if any such representations were made, at least by August or during [403] August, 1943; eleven, that although having such knowledge the plaintiffs did not offer to rescind the release; did not tender the amount of the con-

sideration received by them from the defendant yet remaining in their hands, and did not notify the defendant of the fractured hip, nor of the discovery of the falsity of the representations; twelve, that the failure of the plaintiffs to so notify the defendant or to offer to rescind the release has prejudiced the defendant.

That is the extent of my motion unless you want to listen to some more arguments.

(Thereupon oral arguments were made to the Court.)

The Court: Call in the jury.

(Thereupon the jury returned to the court-room and resumed their respective places in the jury box.)

The Court: I am sorry, gentlemen. I should have excused you until 2. We have been a little longer than I thought we would be, so you may go now until 2 o'clock.

(Thereupon the jury retired from the court-room.)

The Court: Your motion will be denied.

(Thereupon a recess was taken at 11:20 o'clock [404] A. M. of the same day.)

Two-o'clock P. M. of the same day, all parties as heretofore noted by the Clerk's Record being present, with the jury, the trial resumed as follows:

The Court: You may proceed, gentlemen.

(Thereupon closing arguments were presented to the jury by counsel for both sides, after which the Court instructed the jury, as follows.) [405]

THE COURT'S CHARGE TO THE JURY

The Court: It now becomes the Court's duty, gentlemen, to instruct as to the law that applies to this case.

The plaintiffs, by their action, seek to recover damages for injuries received by Zoa H. Zane while riding as a passenger on one of the defendant's busses. They claim that the injuries arose and were caused by the negligent operation of its bus.

You are instructed that a carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care, and if you find that while the plaintiff, Zoa H. Zane, was being carried as a passenger by the defendant, Pacific Greyhound Lines, the bus upon which she was a passenger collided with a truck traveling ahead of said bus and in the same direction and that said plaintiff sustained injuries as a result of such collision, then a presumption of negligence arises which throws upon the defendant, Pacific Greyhound Lines, the burden of showing that the injuries were sustained without any negligence on its part, and in [406] the absence of such evidence your finding should be that the accident and injuries to the plaintiff, Zoa H. Zane, were caused by the negligence of the defendant.

You are instructed, that if you find from a preponderance of the evidence that, prior to the execution of the release introduced in evidence, an agent

or agents of the defendant represented to the plaintiff, Zoa H. Zane, that her only injury was the injury to her right foot and lower right leg, which necessitated the amputation of said leg below the knee, and that she had not sustained any other injuries, and that she would be able to use an artificial limb and avoid the use of crutches, and if you further find from a preponderance of the evidence that said representations were not true and that plaintiffs believed the same and relied thereon, and that had it not been for such representations and such belief and reliance, the plaintiffs would not have executed said release, then, although said agent or agents did not know that said representations were not true at the time they were made, and although there was no fraud or wrongful intent on the part of said agent or agents to deceive or defraud said plaintiff, the plaintiffs are not bound by said [407] release so far as the injuries to the right femur or thigh bone of said plaintiff, Zoa H. Zane, and the results and consequences thereof, are concerned, and the plaintiffs can recover for such injuries and the results and consequences thereof if you find from a preponderance of the evidence that the negligence of the defendant was the proximate cause of said injuries.

You are instructed that if you find from the evidence that, prior to the execution of the release introduced in evidence, Dr. Blackman represented to the plaintiff, Zoa H. Zane, that the only injuries she had sustained as a result of the accident were the injuries to her right lower leg and foot that

necessitated the amputation, and that said plaintiff could use an artificial limb, and if you further find from the evidence that said representations were not true and that said plaintiff, as a result of said accident, sustained a fracture of her right femur or thigh bone resulting in a non-union of said bone with the hip bone, and that said plaintiff could not and cannot use an artificial limb, and if you further find that said representations were believed and relied upon by the plaintiffs, and if you further find that the claim agent of said [408] defendant knew of, approved and ratified said representations, and that the defendant approved the settlement and accepted the benefits thereof, then the defendant is stopped from claiming that said representations cannot be attributed to it, and said release is not a bar to this action.

You are instructed that if you find from a preponderance of the evidence that the claim agent of the defendant, prior to the signing by the plaintiffs of the release relied on by the defendant, had left with the plaintiff, Zoa H. Zane, a form of release in which the consideration was stated to be \$14,500.00 and in which the accident was stated to have resulted in the loss of said plaintiff's right foot and lower leg, and if you further find from the evidence that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff and that as a result said plaintiff signed said release introduced in evidence, then said release is no defense in this

suit and your verdict should be for the plaintiffs for such damages as you may find the plaintiffs have sustained by reason of and as a result of the injury to the right femur or thigh [409] bone of the plaintiff, Zoa H. Zane, if you further find from a preponderance of the evidence that the accident was caused by the negligence of the defendant and that such negligence was the proximate cause of said injury.

You are instructed that it is for you to decide whether representations were made by the defendant or its agents. In determining this I instruct you that direct evidence is not indispensable to prove agency, but that this may be shown by other facts and circumstances from which the agency may be properly inferred, such as the relations of the parties to each other and their conduct in reference to the subject matter involved in the case.

You are instructed that if you find for the plaintiffs, then it is your duty to fix the amount of damages as shown by the evidence relative thereto. In fixing the amount of such damages, if any, you may take into consideration the age of the plaintiff, Zoa H. Zane, the extent of the injuries, if any, to the right femur or thigh bone of said plaintiff, and the results and consequences thereof, her physical and mental pain, suffering and inconvenience already endured, if any, and that she may endure in the future as a result of such [410] injury, if any, and the character of such injury, whether temporary or permanent; you may also consider any reasonable

expense incurred in the treatment of said injury and her inability, if any, to work and earn money, and to perform her duties and to engage in gainful pursuits, and any impairment of her physical powers and any limitations placed upon her in the enjoyment of her physical faculties by reason of said injury, and allow such sum as will under the evidence compensate the plaintiffs for said injury, not, however, exceeding the sum of \$51,565, the amount asked for by the plaintiffs in their complaint.

You are instructed that the plaintiffs in their complaint, among other things, charge that the written release in evidence was executed by the plaintiffs by reason of certain intentional false and fraudulent representations or concealment by the defendant or its agents. You are further instructed that the following elements are necessary to constitute intentional fraud on the part of any person:

One: A representation; two: its falsity; three: its materiality; four: the speaker's knowledge of its falsity or ignorance of its truth; five: his intent that it should be acted upon by [411] the person and in the manner reasonably contemplated; six: the hearer's ignorance of its falsity; seven: his reliance on its truth; eight: his right to rely thereon; nine: his consequent and proximate injury.

It is necessary, of course, that plaintiffs should prove all of these essentials, as to any claim of intentional fraud. The nature and extent of the proof required depends to a great deal upon the relation-

ships existing between defendant and plaintiffs. If they were dealing at arm's length, a greater degree of proof is required than if a confidential relationship existed between them.

You are instructed that fraud on the part of any person is never presumed. It must be established by clear, convincing and satisfactory evidence. You can not find fraud to exist on a mere suspicion as to the possibility thereof.

You are instructed that the plaintiffs in this case contend that they were induced to execute the release in question by reason of false representations made to them that the plaintiff, Zoa Zane, had suffered no fractures from the bus accident except the fractures for which she was treated at the Indio Hospital. They further contend that such representations were false in [412] that the plaintiff, Zoa Zane, in said bus accident had sustained a fracture of the femur of her right hip in addition to the fractures treated at the hospital.

You are further instructed that the burden is upon the plaintiffs to prove to your satisfaction by a preponderance of the evidence, that Zoa Zane did suffer a fracture of the femur of her right hip in said bus accident, and that such fracture existed at the time she was in the Indio Hospital, before you can give consideration to any other features of the case concerning the liability of the defendant, if any.

You are not permitted to presume that representations made to the plaintiffs, or either of them,

were false merely because there is a possibility that the fractured femur could have been caused by the bus accident.

You are instructed that the plaintiffs claim and assert in their complaint that in making a settlement and signing the release in question they relied upon certain statements made to them by one Dr. Blackman, whom they allege to be an agent of the defendant company. Defendant in its answer denies that said Dr. Blackman was or is an agent of the defendant. [413]

Therefore, before you can give any consideration whatever to the alleged representations on the part of Dr. Blackman the plaintiffs must first prove to your satisfaction by a preponderance of the evidence that said Dr. Blackman was at the time that he made such representations, an agent of the defendant company, authorized to make the representations.

You are instructed that while agency does not need to be proved by direct testimony, and may be established from circumstances such as relationship of parties to each other and to the subject matter and their acts and conduct, but the acts and conduct of the principal alone and not of the agent must be relied upon to show agency. Agency can not be proved by declarations of the agent alone or of a third person, other than the principal.

Therefore in this case in determining whether or not Dr. Blackman was an agent of the defendant company, you can not take into consideration the

declarations of Dr. Blackman himself alone or of third persons. You must be governed solely by the acts, conduct and declarations of the defendant company or of its proven, authorized agents. If the only proof of agency are the declarations [414] of Dr. Blackman himself then you must find that no agency existed.

You are instructed that although the defendant company may use and have used Dr. Blackman to treat its own employees for illness and accidents not occurring in the course of employment, under a hospital and medical benefit plan established by the company and for which deductions are made from the pay roll of the employees; that does not necessarily constitute Dr. Blackman an agent of the company insofar as injured passengers and third persons are concerned. That agency, if any, would be restricted to employees entitled to the medical and hospital benefits provided by the company.

You are instructed that there is no legal duty upon a carrier of passengers to furnish medical and hospital services to a passenger injured in an accident, other than first aid. If liability on the part of the carrier for the accident and injuries to the passengers is established, then the carrier becomes liable in damages to the passenger, which includes medical and hospital expenses incurred by him; but that does not place the duty upon the carrier to furnish a physician, medical and hospital assistance to the [415] passenger except such as are necessary for first aid in the first instance.

The only duty that devolves upon the carrier on the injury of a passenger is the duty invoked by the humanitarian doctrine—that is, the duty to use every effort to get the injured passenger to a physician or a hospital for treatment. That fact that a carrier complies with such humanitarian doctrine and takes the injured passenger to a physician for treatment does not in itself constitute such physician an agent of the carrier.

You are instructed that the fact that the defendant company as a part of the settlement with the plaintiffs for their claim for injuries to the plaintiff Zoa Zane, paid the doctor's and hospital bills incurred by Zoa Zane, does not alone constitute the doctor and hospital, or either of them, an agent of the defendant.

You have heard the term "negligence" used in the instructions, gentlemen. Negligence has a very broad, general meaning, but the law gives it a specific meaning and that is the definition I am about to give you, and when I use the term "negligence" in the instructions, unless specifically qualified in some other manner, I shall mean this particular definition: [416]

Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or the doing of what such a person under the existing conditions would not have done. That is the law and it is also a common-sense definition. Negligence is either the doing of what an ordinarily prudent man would

not have done, or the failure to do what an ordinarily prudent man would have done under the circumstances existing at the particular time. You will, therefore, see that we can not say in advance that any particular thing is or is not negligent. It depends upon the circumstances of the particular case, and then what would an ordinarily prudent person under those particular circumstances as they existed have done, or what would he have failed to do.

Now, negligence, in order to be set up on the part of the plaintiffs as ground for recovery must be what we call the proximate cause of the injury or the damage. The question then arises, what is proximate cause? The proximate cause of an accident is the cause without which the accident would not have happened. [417]

You are the sole judges of the facts in this case and of the credibility of the witnesses. You have the responsibility of deciding upon the credibility of all the witnesses and the weight that shall be given to their testimony, whether these witnesses be professional men or laymen. You may believe the testimony of one witness against several, or vice versa, as in your best judgment you decide. The court gives you no advice as to how you shall determine the facts of the case. The law, of course, you must take from the court as correctly expressed in these instructions. In civil actions the preponderance of the credible evidence governs. You are

not required, as in a criminal case, to find facts beyond a reasonable doubt.

In every civil action, as in this case, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence. Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. If, in your final estimate, the evidence is equally balanced as between the plaintiffs and the defendant, then the defendant is entitled to your verdict. On the other hand, any preponderance of the evidence in the plaintiffs' favor, however slight in [418] preponderance, requires a verdict against the defendant.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives, or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of it as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the parties; the manner in which he might be affected by the verdict, and the extent to which he

is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should [419] distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling of bias, you would reach a contrary conclusion.

After you return to your jury room you will select one of your number to act as foreman and you will proceed with your deliberations. After you have agreed upon a verdict you will have it signed by your foreman and return into open court. Any verdict agreed upon must be a unanimous verdict of the jury.

Two forms of verdict have been prepared for your guidance, and, one, omitting the title of the court and cause, reads:

“We, the jury duly impaneled and sworn in the above entitled action, upon our oaths, do find for the defendant, Pacific Greyhound Lines, a corporation.”

If your verdict is for the defendant, you will sign that one. [420]

The other is:

"We, the jury duly impaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiffs and assess their damages at blank dollars."

If your verdict is for the plaintiff, you will insert whatever amount your findings may be and that, of course, must be signed by your foreman.

Anything further, gentlemen?

Mr. Baker: I have no further instructions.

Mr. Carson: No, none, your Honor.

The Court: Any exceptions to the instructions?

Mr. Stahl: Yes, we except to the refusal of the Court to give plaintiffs' requested instruction number 4, on the ground that we believe the instruction correctly states the law applicable to the facts of the case.

Mr. Carson: An exception.

Mr. Stahl: The plaintiffs object and except to the giving of the defendant's requested instruction number 3, as modified, for the reason that it is a general instruction and that it is immaterial whether the representation claimed to have been by the agent of the defendant were intentional or not, and the instruction would lead the jury to believe that it will be necessary for [421] the plaintiffs, in order to establish these misrepresentations as to the extent of the plaintiff's injuries, to prove all of the elements set forth in the instructions,

which is not the law, especially as to the 4th element mention in the instructions, and to the 5th element. We claim that the instruction, if given at all, should be limited to the claim of the plaintiffs as to the substitution of the forms of release.

Mr. Carson: The plaintiffs except to defendant's instruction number 4 on the ground that the instruction sets forth the rule of evidence in equity and it is not related to the case at bar.

Mr. Stahl: The plaintiffs object and except the giving of the defendant's requested instruction number 8—

Mr. Baker: (Interrupting) As modified.

Mr. Stahl: As modified, on the ground that the instruction makes any declarations of the agent inadmissible in evidence to prove agency, even though there is other evidence proving agency, and the law is that the declarations of an agent to prove agency are admissible in connection with or in corroboration of other evidence.

The plaintiffs object and except to the giving of defendant's instruction number 11, on the ground that there is a legal duty upon a carrier to take care of passengers when such passengers are injured by the negligence of a carrier.

Mr. Stahl: That is all.

Mr. Baker: The defendant excepts to the giving of plaintiff's requested instruction number 2, upon the ground that the same does not properly state the law applicable to the facts of this case, in that it fails to give the proper effect to the release admitted and proven in the case, and upon the further

ground that the same contains conflicting instructions intended to confuse the jury, and upon the further ground that the plaintiffs in this case seek recovery on several different theories. This instruction makes no distinction between the theories, and among other things provides that the plaintiffs are entitled to recovery for a single injury without giving credit for the injuries paid for, and also on the ground that the instruction assumes that the release in evidence in this case is not set aside *in toto*.

The defendant excepts to the court giving plaintiffs' requested instruction number 5, and in such respect we refer to the exceptions made to plaintiffs' requested instruction number 2, giving by the court, and reiterate such exceptions to this [423] instruction number 5, on the further ground that said instruction does not state all the elements of fraud necessary to constitute a cause of action by the plaintiffs in this case, and may we at this time also add that last exception to our exception to instruction number 2 requested by the plaintiffs.

This requested instruction number 5 does not properly state the law applicable to the facts in this case, and does not take into consideration the fact that a release was executed releasing them from all known and unknown injuries.

The defendant excepts to the court giving plaintiffs' requested instruction number 6, upon the grounds previously assigned, and upon the further ground that in this instruction the plaintiffs are relying upon intentional fraud, and there is no proof

in the case of such intentional fraud. This instruction does not properly state the law applicable to the facts in this case, and we refer to and reiterate all the exceptions made to the previous instructions.

The defendant excepts to instruction number 10 requested by the plaintiffs upon the ground that such instruction does not properly state the law applicable to the facts of this case in that [424] respect, and I further call attention to court that the instruction in question is one giving to the jury a measure of damages applicable to this case. In such instructions the court does not provide for credit to the defendant for the monies already paid the plaintiffs and, furthermore, the court assumes that the plaintiffs are entitled to recover for injuries to a hip as separated from other injuries, and does not take into consideration the fact that the plaintiffs seek to set aside the entire release by the allegations in their complaint.

The defendant excepts to the refusal of the court to give defendant's instruction number 1, on the grounds stated in defendant's motions for an instructed verdict and a reference is hereby made to such motions on such grounds.

The defendant excepts to the refusal of the court to give defendant's requested instruction number 2, on the ground that the same properly states the law applicable to the facts of this case, and in refusing such instructions the court refuses to give credence and effectiveness to a proper and legal release executed by the plaintiffs.

As to defendant's requested instruction number 6, the defendant excepts to the action of [425] the court in refusing to give such instruction, in that it properly states the law applicable to the facts of this case, and upon the further ground that the court is submitting this case to the jury without a proper instruction as to the burden of proof required to be carried by the plaintiffs in establishing the falsity of an alleged false representation.

As to defendant's requested instruction number 9, the defendant excepts to the refusal of the court to give such instruction, on the ground that the same properly states the law applicable to the facts of this case, and in doing so the court refuses to properly instruct the jury as to the obligation of the plaintiffs to prove the authority of an agent of a principal in order to hold such principal liable for the declarations or representations of such agent.

As to instruction number 13 requested by the defendant, the defendant excepts to the refusal of the court to give such instruction, on the ground that the same properly states the law applicable to the facts of this case, and the refusal of such instruction prejudices the defendant. The instruction properly states the law with reference to the failure of the plaintiffs to give notice of [426] rescission of the release, or notice of discovery of fraud in the execution of the release within a reasonable time and by such actions the court denies the defendant the benefit of an equitable remedy and imposes upon the defendant an undue hardship, in that it appears affirmatively from the evidence the defendant was

prejudiced by the failure of the plaintiffs to give notice of discovery of fraud and notice of rescission of the release.

As to defendant's requested instruction number 14, the defendant excepts to the action of the court in refusing to give such instruction, in that the same properly states the law applicable to the facts of this case, and by such refusal the court substantially instructs the jury that the plaintiff are entitled to recover any amount of damages without credit for the amount previously paid the plaintiffs, and without deduction from the amount of the verdict which they are entitled to return on account of the amount paid by the defendant to the plaintiffs.

The Court: The record may show the exceptions.

Thereupon the bailiff was duly sworn and the jury retired to deliberate upon its verdict at 4:35 o'clock P. M. of the same day. [427]

I Hereby Certify that the proceedings and evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 427 type-written pages contain a full, true and accurate transcript of the same.

LOUIS L. BILLAR,

Official Shorthand Reporter.

[Endorsed]: Filed Oct. 18, 1945. [428]

[Endorsed]: No. 11194. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Greyhound Lines, a corporation, Appellant, vs. Zoa H. Zane and Jack Zane, her husband, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed November 26, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11194

PACIFIC GREYHOUND LINES, a Corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

CONCISE STATEMENT BY APPELLANT OF
POINTS UPON WHICH IT INTENDS TO
RELY UPON APPEAL, WITH DESIGNA-
TION OF PARTS OF TRANSCRIPT OF
RECORD DEEMED NECESSARY FOR
PRINTING

Now Comes Pacific Greyhound Lines, a corpo-
ration, and in accordance with Sub-division 6 of

Rule 19 of the Rules of this Court, hereby states that upon its appeal it intends to rely upon the following points:

1. That the trial court erred in denying defendant's motion for instructed verdict in favor of the defendant made at the close of plaintiff's evidence, for the reason that plaintiffs' evidence was not sufficient to sustain or establish a cause of action or legal claim against the defendant.
2. The court erred in denying defendant's motion for instructed verdict made at the close of all the evidence, for the reason that the evidence was not sufficient to sustain or establish a cause of action or legal claim against the defendant.
3. That the evidence is insufficient to support the verdict or judgment, and the verdict and judgment are not justified by the evidence and are contrary to evidence and the law.
4. That the court erred in denying defendant's motion for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict, and defendant's alternative motion for new trial, for the reasons set forth in said motions, which motions appear upon pages 70 to 73, inclusive, of the Clerk's Transcript of Record.
5. The court erred in refusing to render and enter judgment for the defendant in accordance with motion for directed verdict made at the close of all the

evidence for the same reasons assigned in paragraph 4 hereof.

6. The court erred in giving plaintiffs' requested instructions numbers 2, 5, 6 and 10, upon the grounds that said instructions do not properly state the law applicable to the facts of the case and are not in accordance with the evidence and there is conflict and contradiction in said instructions misleading to the jury and also unnecessary repetition accentuating plaintiffs' theory of the case.

7. The court erred in refusing defendant's requested instructions numbers 1, 2, 6, 9, 13 and 14, upon the grounds that said instructions, and each of them, properly state the law applicable to the facts of the case, and the defendant was entitled to have them given to the jury, and the refusing of the same resulted in the case being submitted to the jury without proper instructions on defendant's theory of the case.

8. The court erred in admitting evidence offered by plaintiffs of conversations with, and acts and declarations by persons not proved to be agents or representatives of the defendant, or authorized to act for or in behalf of defendant, and said evidence was hearsay.

9. The court erred in admitting, over the objections of the defendant, opinion testimony based upon hypothetical questions not proper in form, not properly stating all of the evidence introduced in the case

pertinent to the matter in question, and improperly stating facts which were not in evidence in the case.

10. The court erred in giving contradictory and conflicting instructions to the jury, which misled and confused the jury.

11. The court erred in charging the jury in that there was harmful repetition of many instructions in favor of the plaintiffs, and thereby the court unduly accentuated plaintiffs' theory of the case.

12. That the damages awarded plaintiffs in the verdict of the jury are excessive and appear to have been given under the influence of passion or prejudice.

Pursuant to the aforesaid rule, the appellant hereby designates for printing the following parts and portions of the Transcript of Record filed with this Court by the Clerk of the United States District Court for the District of Arizona, to-wit:

I.

1. Attorneys of Record.
2. Complaint.
3. Answer.
4. Minute Entries (Minute Entries prior to trial on pages 33-34 not deemed necessary to be printed).
5. Instructions requested by Plaintiffs.
6. Instructions requested by Defendant.
7. Verdict.

8. Judgment.
9. Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial (Memorandum of Points and Authorities attached to the foregoing motions, said memorandum appearing upon pages 74-80 are not to be printed.)
10. Minute Entries of Clerk from June 4th to October 18th, 1945.
11. Notice of Appeal.
12. Supersedeas and Cost Bond.
13. Designation of Record and Proceedings to be Contained in Record on Appeal.
14. Stipulation for Dimunition of Record.
15. Order to Send Up Original Exhibits.
16. Clerk's Certificate to Transcript of Record.

II.

The Reporter's Transcript of Evidence in two volumes should be printed in its entirety.

III.

The following exhibits in evidence should be printed or incorporated in the printed record by means of photostatic copies:

1. Plaintiffs' Exhibits numbers 1 and 2.
2. Defendant's Exhibits, A, B, C, D, E, K, L, M, N, P, S, T, U, V, W, X, Y, Z, AB, AC.

3. The following parts and portions of Defendant's Exhibit AD, to-wit:

All the monthly bank statements of the head office of the First National Bank of Arizona, Phoenix, Arizona, showing the status of the account of Zoa Zane. Said statements are upon yellow paper and are 23 in number, and the first one is for the month of March, 1943, and the last one is for the month of April, 1945.

Appellant does not request or require the printing or incorporation in the printed record of the cancelled checks contained in said defendant's Exhibit AD.

Dated at Phoenix, Arizona, this 24th day of November, 1945.

BAKER & WHITNEY.

By ALEXANDER B. BAKER,
Attorneys for Appellant.

Copy Received this 24th day of November, 1945.

TERRENCE CARSON.

STAHL & MURPHY.

By FLOYD M. STAHL,
Attorneys for Appellees.

[Endorsed]: Filed November 26, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF TRANSCRIPT
OF THE RECORD DEEMED NECESSARY
FOR PRINTING BY APPELLEES

Comes Now the Appellees above named, Zoa H. Zane and Jack Zane, her husband, and hereby designate for the printing the following parts and portions of the Transcript of the Record filed with this Court by the Clerk of the United States District Court for the District of Arizona, to-wit:

Plaintiffs' Exhibits 5, 6 and 12, also this designation.

Dated at Phoenix, Arizona, this 30th day of November, 1945.

TERRENCE A. CARSON.
STAHL & MURPHY.

By FLOYD M. STAHL,
Attorneys for Appellees.

Copy received this 30th day of November, 1945.
BAKER & WHITNEY.

By BAKER & WHITNEY,
Attorneys for Appellant.

[Endorsed]: Filed December 3, 1945, Paul P. O'Brien, Clerk.

No. 11194

IN THE
**United States Circuit Court of Appeals
For the Ninth Circuit**

PACIFIC GREYHOUND LINES, a corporation,
Appellant,
vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday,
August 26, 1946

Before: Mathews, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Alexander B. Baker, counsel for appellant, and by Messrs. Floyd Stahl and Terrence A. Carson, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday,
February 28, 1947

Before: Mathews, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT.**

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,194

Feb. 28, 1947

PACIFIC GREYHOUND LINES, a corporation,

Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,

Appellees.

Upon Appeal from the District Court of the
United States for the District of Arizona

Before: Mathews, Healy and Bone, Circuit Judges.
Bone, Circuit Judge.

OPINION

This is an appeal from a final judgment of the district court. Appellant's motion for judgment n.o.v. and for a directed verdict and alternative motion for a new trial were denied.

Appellant's answer was a general denial which put appellees on proof of all of the allegations of their complaint. It further asserted that the release referred to below was a complete bar to appellees' action.

Zoa H. Zane (then 23 years of age and in good health), a citizen of Arizona, was injured near

Indio, California, while riding as a pay passenger on a bus owned and operated by appellant, a citizen of California. She was immediately taken to a nearby hospital operated by one Dr. Blackman where it was found necessary to immediately amputate her right leg at a point below the knee. The necessity for the operation and the liability of appellant for the injury are not issues on this appeal. There was evidence from which the jury could have found: That while Zoa H. Zane was in the hospital, one Cameron, who was a claim agent of appellant, called upon her to discuss the matter of a settlement of her claim for personal injuries; that Blackman and Cameron falsely stated and represented to her that her sole and only injury was the loss of her lower right leg and that she had suffered no other or further injury; that Cameron advised her that Blackman was appellant's doctor, that he was a good and capable doctor with a high degree of medical skill, and that she could depend and safely rely upon whatever Blackman might tell her in regard to her injuries and condition; that both of these men acted in this matter as agents of appellant, and that as a result of these false representations, appellees were led to sign and deliver a certain "release" to appellant; that while all of said statements and representations of Blackman and Cameron were false, said statements resulted in entirely deceiving her as to the nature and extent of her injuries; that at and during this period she did not have or retain the services of a doctor or a lawyer because she relied implicitly upon what

was told her by Blackman and Cameron respecting her injuries; that some time after her discharge from the hospital, she discovered that in the said bus accident she had also suffered a severe fracture of her right femur, which fact Blackman and Cameron failed to disclose to her and wilfully and deliberately hid from her by said false and misleading representations.

That about three weeks prior to the actual signing of said release by appellees, Cameron left with Zoa H. Zane, for her inspection at the hospital, a printed form of release¹ to be signed if and when a settlement was agreed upon; that the printed

1

“RELEASE IN FULL

IPGL-2251-B

“Received of Pacific Greyhound Lines the sum of Fifteen Thousand nine hundred sixty-seven and 00/100 Dollars (\$15,967.00) in consideration of which sum we hereby release and discharge Pacific Greyhound Lines of and from any and all claims and demands which we now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at Point on U. S. Highway #99, near Indio, California, resulting in personal injury and property damage.

“It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

“It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors

form was in letters and figures exactly as indicated in footnote 1, save and except that the printed form so left with Zoa H. Zane contained certain words which had been added thereto and written into the release form in ink, that is, interpolated into the text of the printed form; that these added words were "Loss of right foot and lower leg"; that this qualifying phrase was written into the printed form

of any liability whatsoever in consequence of said accident.

"Dated at Indio, Calif., this 19 day of February, 1943.

"ZOA ZANE (L.S.)
JACK ZANE (L.S.)
M. CAMERON,
Witness.
ALPHA R. MARCUM,
Witness.

"This release should not be signed unless read by or read to the person signing same.

"State of _____
County ofss.

"On the day of 19....., before me personally appeared, to be known and known to me to be the same person mentioned and described in and who executed the above instrument and acknowledged to me that executed the same.

Notary Public.

"Section 1542 of the Civil Code referred to in the above release reads as follows:

"'1542. Certain claims not affected by general release. A general release does not extend to claims which the creditors does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor.'

"Form 71008C 15M 1041 (S&C)"

of release at a place immediately after the printed words "resulting in", which latter words appear near the end of the first paragraph of the printed form; that the understanding of appellees was that this limiting and qualifying phrase had been inserted in the printed form of release to indicate the exact nature and extent of the injury for which appellees were to be compensated in the pending settlement; that appellees would not have later signed the release in the form appearing in footnote 1 had they known at the time of signing it that Zoa H. Zane had also suffered the additional femur injury in the bus accident.

That immediately before the release was signed by appellees, Cameron came to the hospital room of Zoa H. Zane and, ostensibly for the purpose of examining it, requested permission to take from the room the form of release which she had been holding; that he returned in a few minutes, bringing with him what she then thought was the same form of release she had just surrendered to him; that while out of the room, Cameron deliberately substituted another form of release for the one he had taken from her room, the substituted release being the same printed form of release, but one not containing the interpolated qualifying phrase "Loss of right foot and lower leg"; that this substitution of forms of release was not made known to Zoa H. Zane, who thereupon joined with her husband in signing the release, fully believing that it was the form containing the said qualifying phrase; that this deception caused them to sign a release which

did not contain the said phrase which they desired for their protection and believed to be in the release; that procuring appellees to thus sign the release was a willful, actual and deliberate fraud on appellees; and that appellees would not have signed the release had they known it did not contain the ink interlineation of the phrase mentioned.

Below and here, the position of appellees was and is that the facts were as outlined above; that as a result thereof, the release they signed was not a bar to their action, due to the fraud practiced on them, which nullified the release and destroyed its purported effect; and that they may recover in this action for the added and undisclosed femur injury.

From the above summary and from an inspection of appellees' complaint, certain matters are made abundantly clear. Appellees based their right of recovery and their right to avoid the purported effect of the said release upon a showing at the trial of actual fraud practiced by appellant's agents. In sweeping terms their complaint charged that "all of the statements and representations" made to them by the said two agents of appellant "were wholly false and untrue, and either were made by said Doctor and said claim agent, who then and there were the agents of the defendant, knowing the same to be false and untrue, or were made recklessly and without regard as to their truth or falsity, and with a full means of knowledge of their falsity"; [emphasis supplied] that Dr. Blackman,

on many occasions, "Falsely stated and represented." The same specific charge of actual fraud is made against Cameron.

There can be no doubt that both pleadings and proof of appellees made the existence or non-existence of actual and intentional fraud the paramount and decisive issue in this case. It is also clear that appellees relied on the charges and proof of actual fraud to void the release.

This view of appellees' theory of the case finds support in the instructions given by the court. In these instructions it is obvious that the court was of the view that the right of appellees to avoid the purported effect of the release and to have a verdict at the hands of the jury rested, in the last analysis, upon convincing proof of acts on the part of agents of appellant amounting to actual fraud upon appellees. This is indicated by the following instructions to the jury:

"You are instructed that the plaintiffs in their complaint, among other things, charge that the written release in evidence was executed by the plaintiff by reason of certain intentional false and fraudulent representations or concealment by the defendant or its agents. You are further instructed that the following elements are necessary to constitute intentional fraud on the part of any person:

"One: A representation; two: its falsity; three: its materiality; four: the speaker's knowledge of its falsity or ignorance of its

truth; five: his intent that it should be acted upon by the person and in the manner reasonably contemplated; six: the hearer's ignorance of its falsity; seven: his reliance on its truth; eight: his right to rely thereon; nine: his consequent and proximate injury.

"It is necessary, of course, that plaintiffs should prove all of these essentials, as to any claim of intentional fraud. The nature and extent of the proof required depends to a great deal upon the relationships existing between defendant and plaintiffs. If they were dealing at arm's length, a greater degree of proof is required than if a confidential relationship existed between them.

"You are instructed that fraud on the part of any person is never presumed. It must be established by clear, convincing and satisfactory evidence. You can not find fraud to exist on a mere suspicion as to the possibility thereof.

"You are instructed that the plaintiffs in this case contend that they were induced to execute the release in question by reason of false representations made to them that the plaintiff, Zea Zane, had suffered no fractures from the bus accident except the fractures for which she was treated at the Indio Hospital. They further contend that such representations were false in that the plaintiff, Zea Zane, in said bus accident had sustained a fracture of the femur of her right hip in addition to the fractures treated at the hospital.

"You are instructed that if you find from a preponderance of the evidence that the claim agent of the defendant, prior to the signing by the plaintiffs of the release relied on by the defendant, had left with the plaintiff, Zoa H. Zane, a form of release in which the consideration was stated to be \$14,500.00 and in which the accident was stated to have resulted in the loss of said plaintiff's right foot and lower leg, and if you further find from the evidence that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff and that as a result said plaintiff signed said release introduced in evidence, then said release is no defense in this suit and your verdict should be for the plaintiffs for such damages as you may find the plaintiffs have sustained by reason of and as a result of the injury to the right femur or thigh bone of the plaintiff, Zoa H. Zane, if you further find from a preponderance of the evidence that the accident was caused by the negligence of the defendant and that such negligence was the proximate cause of said injury." [Emphasis supplied.]

Instructions of the foregoing character leave no doubt that the trial court was clearly of the view that appellees had undertaken to rest their case upon the theory and proof that actual and inten-

tional fraud had been practiced upon them which finally resulted in the execution of the release relied upon by appellant.

We now consider appellant's contentions regarding the fraud issue. Appellant assigns error on the giving of an instruction (No. 2) requested by appellees, which reads as follows:

“You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that, prior to the execution of the release introduced in evidence, an agent or agents of the defendant represented to the plaintiff, Zoa H. Zane, that her only injury was the injury to her right foot and lower right leg, which necessitated the amputation of said leg below the knee, and that she had not sustained any other injuries, and that she would be able to use an artificial limb and avoid the use of crutches, and if you further find from a preponderance of the evidence that said representations were not true and that plaintiffs believed the same and relied thereon, and that had it not been for such representations and such belief and reliance, the plaintiffs would not have executed said release, then, although said agent or agents did not know that said representations were not true at the time they were made, and although there was no fraud or wrongful intent on the part of said agent or agents to deceive or defraud said plaintiff, the plaintiffs

are not bound by said release so far as the injuries to the right femur or thigh bone of said plaintiff, Zoa H. Zane, and the results and consequences thereof, are concerned, and the plaintiffs can recover for such injuries and the results and consequences thereof if you find from a preponderance of the evidence that the negligence of the defendant was the proximate cause of said injuries.” [emphasis supplied]

It seems clear to us that in giving this (plaintiffs' requested) Instruction No. 2, the court completely parted company with the trial theory of appellees under which they rested their right of recovery on a showing of actual fraud. This instruction dealt with constructive fraud. It clearly authorized the jury to find for appellees if constructive fraud was shown by the evidence to have characterized acts of appellant's agents.

This aspect of the case becomes decisive in light of the rule announced by the California decisions, where the right of recovery is predicated upon a showing of constructive fraud (to avoid a release). The party injured by the constructive fraud must rescind the release contract and offer restitution of the consideration. On the other hand, *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042, holds that the rule of rescission and restitution does not apply where a party is tricked or deceived into signing a contract different by its terms and objects from the contract he had made and which he understands he is executing. Under such a state of facts, the fraud-feasor

is not entitled to the return of the money paid as compensation for an acknowledged injury. See also *Backus v. Sessions*, 17 Cal. (2nd) 380, 110 Pac. (2nd) 51; *Tyner v. Axt*, 298 Pac. 537, 113 Cal. App. 408; *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334.

This instruction on constructive fraud is therefore erroneous in that nothing is said therein respecting the necessity for rescission of the release contract and restitution of the consideration paid thereunder. See *Taylor v. Hopper*, 207 Cal. 102, 276 Pac. 990; *Gareia v. Cal. Trucking Co.*, 183 Cal. 767, 192 Pac. 708. Cf. *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334. It may be that the cases do not make wholly clear exactly at what point of time rescission and restitution must be effected, but the California rule would seem to indicate that both must be shown by the evidence before a right of recovery exists. By the instruction here complained of, the jury was told that it might return a general verdict for appellee without any proof or showing that they had offered to rescind the contract of settlement and/or to make restitution of the money paid to them under the release settlement.

This is more clearly demonstrated by the fact that on trial appellees admitted that they were unable to tender or repay the consideration which they received from appellant in the settlement, because they had spent most of the money. Their complaint also alleges substantially the same fact.

The court may have given the instruction on constructive fraud on the theory that the provisions of section 1542 of the Civil Code of California (see

text of section in footnote 1) applied to the state of facts revealed by the evidence. Appellees requested an instruction which applied the rule of section 1542, but withdrew it.

In the absence of actual fraud, the express waiver of all rights under this section (1542) was valid. See *Berry v. Struble*, 20 Cal. App. (2nd) 299, 66 Pac. (2nd) 746. Cf. *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 28 Pac. (2nd) 433.²

On this state of the record, it is clear that it was the province of the jury to determine from all of the evidence whether appellees had been tricked by the fraudulent acts and representations of appellant's agents into believing that they were signing a release which, by its terms, covered only the loss of a right foot and lower right leg.³ Under Cali-

²For a comparison of additional cases dealing with the type of release employed in the instant case see: *O'Meara v. Haiden*, 268 Pac. 334 (1928); *Gambrel v. Duensing*, 16 Pac. (2nd) 284 (1932); *Backus v. Sessions*, 110 Pac. (2nd) 51 (1941). See also comment on section 1542 in *Rued v. Cooper*, 119 Cal. 463, 469.

³In *Wilson v. San Francisco-Oakland Terminal Rys.*, 48 Cal. App. Rep. 343, 349, the court held that where a release of a claim for damages for personal injuries is tainted with fraud it should not be sustained, the question of whether or not such taint exists being one to be submitted to and decided by the jury. See also *Jordan v. Guerra*, 144 Pac. (2d) 349. The rule of the Wilson case also supports the contentions of appellees that the proof they tendered regarding the agency of Dr. Blackman and Cameron was properly submitted to the jury for determination as to its probability and truth.

fornia decisions, where such a fraud is practiced on the releasor and he is thereby led to execute a release which is different in its terms and objects from the contract he has made and which he understands he is signing. the release contract thus signed becomes absolutely void. This, because the mind of the releasor never consented to any such release. Herein it differs from a release the nature and contents of which the releasor understood correctly, but which he was led to execute by fraud and deception as to something other than the contents of the release contract. In such latter case the contract would not be void, but only voidable.⁴

Some of the California decisions hold that in cases of actual fraud, the release contract should be reformed to speak the understanding of the parties at the time of its execution, and in that form, it stands as the agreement of the parties as to the known injuries.⁵

As indicated above, we confront a posture of the case, where under Instruction No. 2, the jury was at liberty to find a general verdict for appellees

⁴Backus v. Sessions, 110 Pac. (2nd) 51 (1941); Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042; Tyner v. Axt, 298 Pac. 537 (rehearing denied); Cf. O'Meara v. Haiden, 268 Pac. 334 (1928); Mairo v. Yellow Cab Co., 281 Pac. 66 (rehearing denied); Raynale v. Yellow Cab Co., 300 Pac. 991.

⁵See Backus v. Sessions, 110 Pac. (2nd) 51 (1941); Raynale v. Yellow Cab Co., 300 Pac. 991; Tyner v. Axt, 298 Pac. 537 (rehearing denied); Jordan v. Guerra, 144 Pac. (2nd) 349; O'Meara v. Haiden, 268 Pac. 334 (1928); Cf. Romano v. Seibt, 272 Pac. 1065.

which could have rested on testimony which fell short of establishing the existence of actual fraud on the part of agents of appellant, but did prove, or tend to prove, the existence of constructive fraud in the various transactions shown by the evidence. Nothing in the record enables us to ascertain upon which theory of fraud the jury may have rested its general verdict. The presence of these conflicting instructions provides no assurance that the error did not materially affect the jury's verdict. At best, it was left to take its choice between two inconsistent theories of recovery.⁶

The verdict under the evidence might stand if it could be clearly shown (as below indicated) that it rested upon satisfactory proof of actual fraud, but for the reasons indicated above, it must fail if rested on proof of constructive fraud. Had there been a special or fact-verdict, or if the general verdict had been coupled with answers to fact-interrogatories clearly indicating that the general verdict was rested on proof of actual fraud, we would know to a certainty that giving the instruction on construc-

⁶We do not overlook the argument that the test of the correctness of instructions is whether, upon the whole charge, the jury will gather the proper rules to be applied in arriving at a correct decision. The harmless error doctrine is so eminently sensible that it should be freely used. But its use in connection with jury trials where, as here, the jury brings in merely a general verdict, often presents a troublesome problem.

tive fraud was harmless error.⁷ As it is, we are unable to determine and therefore cannot say that it affirmatively appears from the whole record that giving these inconsistent instructions was harmless error. See *Bollenbach v. United States*, 326 U. S. 607; *Bilh v. United States*, 328 U. S. . . ., June 10, 1946; *Kotteakos v. United States*, 328 U. S. . . ., June 10, 1946; *Ah Fook Chang v. United States*, 9 Cir, 91 F. 2d 805; *Lynch v. Oregon Lumber Co.*, 9 Cir, 108 F. 2d 283.

Appellant has assigned as error the giving of certain instructions here considered. One of these advised the jury that appellant was estopped from claiming that the representations of Dr. Blackman cannot be attributed to it, and that the release was not a bar to the action, if the jury found: (a) that the statements and representations of Dr. Blackman were not true, (b) were relied on by appellees, (c) that Cameron, the claim agent knew of, approved and ratified said representations, (d) that appellant approved the settlement and accepted the benefits thereof. (Plaintiffs' Requested Instruction No. 5) Appellant cites no cases in support of this contention. As applied here it does not incorrectly state the law.

⁷The Federal Rules of Civil Procedure (Rule 49) were designed to encourage and facilitate the use of the special verdict or, in the alternative, the general verdict accompanied by the jury's answers to interrogatories as to issues of fact. As an appellate court we have no power to direct trial judges to call for fact-verdicts, but a general and unexplained lump verdict does not cover up substantial errors at the trial.

Another instruction (set out above) dealing with the claimed substitution of forms of release, is assailed. It requires no comment at this point in view of our disposition of the case.

Criticism is directed at an instruction dealing with the amount of damages the jury might award, this on the ground that it failed to require the jury to give credit for amounts paid by appellant under the release contract. Appellant's proposed instructions as to rescission and restitution were refused. Our decision disposes of these issues.

The case is remanded with directions to grant a new trial.

[Endorsed]: Opinion. Filed Feb. 28, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11194

PACIFIC GREYHOUND LINES.

Appellant,

vs.

ZOA H. ZANE, et al.,

Appellees.

JUDGMENT

Upon appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Arizona and was duly submitted:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court with directions to grant a new trial, with costs in favor of the appellant, and against the appellees.

It is further ordered and adjudged by this Court that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered February 28, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 8, 1947

Before: Mathews, Healy and Bone, Circuit Judges

[Title of Cause.]

ORDER DENYING PETITION
FOR REHEARING

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellees, filed April 3, 1947, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred ninety-three (493) pages, numbered from and including 1 to and including 493, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the Said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of April, 1947.

[Seal]

PAUL P. O'BRIEN,
Clerk.

No. 11,194

United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,
vs.
ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

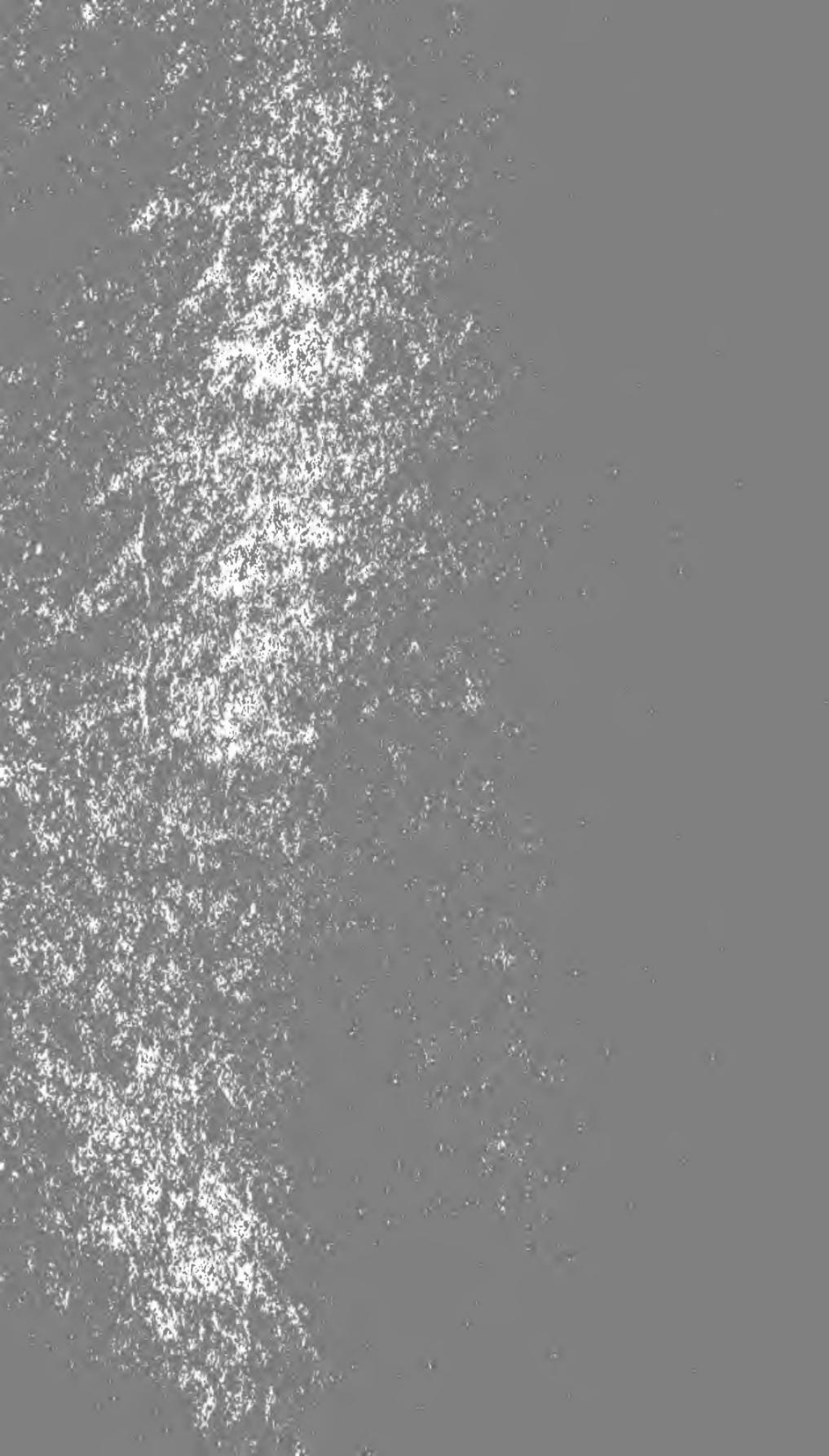
APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona.

BAKER AND WHITNEY,
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Attorneys for Appellant.

FEB 11 1948



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United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona.

I.

JURISDICTIONAL STATEMENT

This suit was originally brought in the District Court of the United States for the District of Arizona by the filing on December 9, 1944, of a complaint in which plain-

NOTE: All figures in parentheses, thus (3), refer to pages of the printed transcript of record unless otherwise expressly identified.

tiffs seek to recover from defendant damages in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars (\$51,565.00) by reason of injuries received by the plaintiff, Zoa H. Zane, in a motor passenger bus accident which occurred on or about December 11, 1942, in the vicinity of Indio, California. It is alleged in the complaint that after said accident the defendant paid plaintiffs the sum of Fourteen Thousand Five Hundred Dollars (\$14,500.00) in settlement of the same, and a written release was signed, executed, and delivered to the defendant by the plaintiffs; but it is further alleged that at the time of the execution of said release the plaintiffs believed that the only injury received by the plaintiff, Zoa H. Zane, was an injury to her right foot and lower right leg which necessitated amputation of the said right leg below the knee. It is further alleged that thereafter plaintiffs discovered that in addition to the injury necessitating the amputation of Zoa H. Zane's right leg below the knee, she suffered a fracture of her right femur or thigh bone at the time of said accident which was unknown at the time of the execution of the release, and the damages sought to be recovered are on account of said injury (2-20).

The jurisdiction of the District Court over the parties and the subject matter was invoked under Paragraph (1), Section 41, Title 28, United States Code, because: (a) the suit is between citizens of different states, plaintiffs being citizens and residents of the State of Arizona, and the defendant being a citizen and resident of the State of California, duly qualified and authorized to do business in the State of Arizona as a foreign corporation (2); and (b) the value of the matter in controversy exceeds exclusive of

interest and costs the sum of Three Thousand Dollars (\$3,000.00) (20).

Jurisdiction is conferred upon this court to entertain and decide the case upon this appeal by Section 225, Title 28, United States Code (the case not falling within Section 345 of the same title) in that a verdict of the jury for the sum of Ten Thousand Dollars (\$10,000.00) in favor of the plaintiffs was returned on May 22, 1945 (58), and on May 28, 1945, judgment was entered in favor of plaintiffs and against said defendant on said verdict for the sum of Ten Thousand Dollars (\$10,000.00) together with interest thereon at six per cent (6%) per annum from May 22, 1945, and for costs taxed and allowed in the sum of Twenty-three Dollars and Twenty-six Cents (\$23.26) (59-61). On June 1, 1945, defendant filed its motion for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict; and alternative motion for new trial (61-65), which motions were denied on July 25, 1945 (67). Thereafter on October 18, 1945, defendant filed notice of appeal, supersedeas and cost bond, and designation of record and proceedings to be contained in record on appeal (68-72).

II.

STATEMENT OF THE CASE

The complaint filed herein is in three counts, the first count stating in substance as follows:

After alleging jurisdictional facts, and the fact that defendant was a carrier of passengers for hire, it is stated

that the plaintiff, Zoa H. Zane, on December 11, 1942, was a paid passenger on a bus of the defendant, and that at a point in the State of California near Indio there was an accident due to the negligence of the defendant, and as a result plaintiff, Zoa H. Zane, received injuries to her right foot and lower portion of her right leg necessitating the amputation of the right leg below the knee, and in addition thereto received a fracture of her right femur or thigh bone. Recovery is sought in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars (\$51,565.00) for said fracture of right femur or hip (2-6).

In the second count plaintiffs reiterate the allegations of the first count concerning the accident and injuries received, and in addition allege that the plaintiff, Zoa H. Zane, was taken to a hospital in Indio, California, where her right leg was amputated below the knee. Soon thereafter a claim agent of the defendant called upon the plaintiff at the hospital and stated that the attending doctor was defendant's doctor, and that defendant would pay for medical and hospital services and that the doctor was a capable physician, and that plaintiff could rely upon him. The doctor attended Zoa H. Zane daily and the claim agent visited her frequently, and both the doctor and claim agent were agents acting for the defendant. It is further alleged said plaintiff while in the hospital was in a weak condition, and the claim agent and doctor gained her confidence, and she relied upon and believed their statements; that said alleged agents of the defendant falsely represented to plaintiff that her only injury was the injury to the right foot and lower right leg which necessitated the amputation, and that she had not sustained any other injuries, and that she would

be able to use an artificial limb and be able to walk without the aid of crutches, and in course of time would be able to use an artificial limb to practically the same extent as though she had her natural leg and foot. It is further alleged that plaintiff believed and relied upon said representations which were false and untrue, and made by said agents knowing the same to be false and untrue, or recklessly made without regard to their truth or falsity; it is alleged that in addition to said amputation of leg plaintiff had in said accident received a fracture of her right hip. It is further alleged that while in said hospital said claim agent and doctor urged plaintiff, Zoa H. Zane, to agree upon a settlement of the claim for damages, and thereafter the plaintiffs, Zoa H. and Jack Zane, agreed with the claim agent upon a settlement of their claim for injuries below the knee for the sum of Fourteen Thousand Five Hundred Dollars (\$14,500.00) which was paid, and plaintiffs executed and delivered to defendant a general release purporting to release and discharge the defendant for any and all claims from plaintiffs on account of the accident. It is further alleged in said second count that plaintiffs executed said release in reliance upon these representations of defendant's agents that the only injury received by Zoa H. Zane was that requiring amputation of the leg below the knee, and that they did not know for a long time afterwards of the existence of a fracture of the right hip, and the release was executed in ignorance of such additional injury, and the plaintiffs would not have executed the same if they had had knowledge of such injury to the hip, and for such reasons the release did not apply to the injury to the hip (6-11).

In paragraph VI of the second count of the complaint, Section 1542 of the Civil Code of California is set forth in haec verba (12). It is further alleged in said paragraph that under the decisions of the Supreme Court of the State of California, a release executed by one who has sustained injuries does not cover injuries unknown or unsuspected to exist at the time of the release, but covers only known injuries, and that no rescission of release or offer to restore consideration is necessary (12).

In paragraph VII of said second count it is alleged that the plaintiffs have not been able to tender or repay the consideration received by them from the defendant on account of the release for the reason that they did not know of injuries to the right hip of plaintiff, Zoa H. Zane, until long after the settlement was made; that, therefore, the plaintiffs have been and are unable to tender or repay to the defendant the consideration received by them; the plaintiffs further allege that they are unable to tender or repay the defendant the consideration received by them on account of the fact that they, the plaintiffs, have been compelled to spend a large portion of such moneys for medical, hospital, x-rays, nurses, and other expenses in trying to heal or cure said injury of the hip (12-13).

Paragraphs VIII and IX of said second count of the complaint set forth the damages alleged to have been suffered by the plaintiffs on account of said injury to the hip and seek recovery in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars (\$51,565.00) therefor (8-9, 13-15).

The third count of the complaint is substantially the same as the second count. As we read it, the difference is in words

and not in substance and we do not deem it necessary to recite the allegations (15-20).

The answer denies all material allegations of the complaint and sets up the written release as a special defense (21-30).

III.

SUMMARY OF UNDISPUTED FACTS

From the evidence it appears that plaintiff, Zoa H. Zane, was a passenger on a bus of the defendant, and that on or about the morning of December 11, 1942, at a point near Indio, California, said bus collided with the rear end of a truck, and the plaintiff was injured. She had a child with her who was also injured. There is no necessity of going into details of the accident as defendant introduced no evidence denying negligence (87-88). She was taken to the Coachella Valley Hospital at Indio in an ambulance (89); some of the injured passengers were taken to the La Casita Hospital in Indio (344), and apparently the ambulances were furnished by the State Highway Patrol and the Sheriff's Office at Indio (350).

She was treated at the hospital by a Dr. Blackman, and her right leg below the knee was amputated (89-90). The amputation was on a Friday, and on the following Tuesday a Mr. Cameron, Claim Agent for the defendant, called upon plaintiff (93-94). About a week later Mr. Cameron called again and at first his calls were about a week apart (135). During his first three or four visits he made no effort to settle with plaintiff for her injuries and was only solicitous of her welfare, and stated that he was calling upon other

passengers injured in the accident and arranging settlements (134-135). He never discussed settlement and never asked plaintiff what she demanded, and made no offer until after the second operation upon the plaintiff, which operation was about six weeks after she entered the hospital (135-136). The second operation was for the purpose of repairing the stump to enable the patient to wear an artificial limb (97).

The first time Mr. Cameron asked plaintiff, Zoa Zane, what she would accept in settlement for her injuries, which was about six weeks after she entered the hospital, she demanded \$50,000, which was refused (136). About a week later plaintiff offered to accept \$25,000 which Cameron stated he would have to submit to the head office of the Greyhound Lines, and later returned to the hospital and advised plaintiff that the company would only pay \$12,000 (137). Plaintiff, Zoa Zane, discussed this offer of settlement with her husband, Jack Zane, who was frequently in Indio, and was fully advised of all negotiations for settlement (137-138). After discussions between the plaintiffs, Zoa and Jack Zane, they decided to accept \$15,000 for all injuries known to have been received in the accident (138), and with the approval of her husband (140), Zoa Zane sent the following telegram to Cameron on January 29, 1943: "Will Settle for 15000 Plus Hospital Expenses." (Defendant's Exhibit A—139). *The Greyhound Company paid the plaintiffs exactly what they demanded in the telegram—the company paid plaintiffs \$14,500.00 for injuries to Zoa Zane, \$500.00 for injuries to the child, and all hospital and medical expenses (139-140).*

About three days after plaintiff sent the telegram, Exhibit A, Cameron delivered plaintiff, Zoa Zane, at the

hospital a form of release (141) and as Jack Zane was not there at the time, he left the release to be executed upon his return (141), and such form of release was in Mrs. Zane's possession until February 19, 1943 (141-142). Mrs. Zane claims that the form of release so left with her by Cameron was not the same as the release finally executed—that it contained all of the same printed matter—but two of the blanks were filled in different in that the consideration was \$14,500.00 instead of \$15,967.00, and the injuries were recited as "loss of right foot and lower leg" (175-176).

Thereafter, on February 19th Cameron again called at the hospital and Mr. and Mrs. Zane were both present. The terms of the release were discussed *before it was signed* (145). The release was signed by the plaintiffs, Zoa Zane and Jack Zane before the witnesses, Alpha R. Marenum and M. Cameron (142). The release, which is defendant's Exhibit B in evidence, provides that in consideration of the sum of \$15,967.00 the plaintiff's release and discharge Pacific Greyhound Lines

"of and from any and all claims and demands which we now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at Point on U. S. Highway No. 99, near Indio, California, resulting in personal injury and property damage.

"It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

* * * * *

"This release should not be signed unless read by or read to the person signing same.

* * * * *

"Section 1542 of the Civil Code referred to in the above release reads as follows:

'1542. Certain Claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor.' " (143-144)

At the same time Cameron delivered to plaintiffs one draft payable to "Zoa Zane and Jack Zane, her husband, and Coachella Valley Hospital" in the sum of \$14,500.00 (Defendant's Exhibit C in evidence) which draft also contained a "RECEIPT AND RELEASE" providing that the plaintiffs release and discharge Pacific Greyhound Lines "of and from any and all claims and demands which the undersigned now has or may hereafter have on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at or near the city of Indio, in state of California." Such "RECEIPT AND RELEASE" was signed by the plaintiffs and the draft was endorsed and cashed by the plaintiffs (146-150). It would appear that such draft was deposited by plaintiffs in the Bank of America at Indio on February 27, 1943 (149). Also on February 19th Cameron delivered to the plaintiffs a second draft (Defendant's Exhibit D in evidence) in the sum of \$1467.00 payable to "Jack Zane and Zoa Zane, husband and wife, and Coachella Valley Hospital and Dr. W. H. Blackman" which draft contained the same "RECEIPT AND RELEASE" signed by plaintiffs as Exhibit C. The last mentioned draft was endorsed by plaintiffs and delivered to the hospital

(151-154). It was in payment of all hospital and medical expenses up to the date of settlement (154).

Mrs. Zane left the hospital about March 8th and returned to Phoenix. Mrs. Zane paid hospital and medical expenses incurred between February 19th and March 8th, amounting to \$140.00, from the \$14,500.00 paid her by defendant (169-170). By the time of the trial of this case the plaintiffs had expended the whole of said sum of \$14,500.00 (169). Of this sum so expended, plaintiff could only account for approximately the sum of \$825.00 expended for medical and hospital expenses and costs of treating injuries since the time of the release (170-173). This \$825.00 includes \$140.00 paid the hospital at Indio and also a very vague sum paid a Dr. Wilson in Los Angeles (170, 171). After returning to Phoenix Mrs. Zane continued to suffer the same pains and discomfort she had suffered in the hospital in Indio, but did not go to a doctor until August, 1943, when she discovered from X-rays that she had suffered a fractured hip in addition to the other injuries (124, 174). Thereafter, an operation was performed upon the plaintiff, Zoa Zane, by Dr. Lytton-Smith in an effort to produce union of the fracture in the femur, which was unsuccessful. In October, 1943, Jack Zane telephoned to Dr. Blackman in Indio and accused him of being responsible for Mrs. Zane's condition and told him that he should be sued (245-246). The plaintiffs never brought suit against Dr. Blackman (246). The plaintiffs made no demand whatever upon Pacific Greyhound Lines before this suit was filed, which was on December 9, 1944 (247, 20).

Defendant's Exhibit AD in evidence (288-311) consists of monthly bank statements and cancelled checks volun-

tarily produced by Mrs. Zane to show how the plaintiffs expended and what became of the money they received from the defendant. It appears that the \$500.00 paid for injuries to the child was paid to Mr. Zane and therefore is not reflected in the bank account of Mrs. Zane (240). From such bank statements it appears that Mrs. Zane deposited in the First National Bank of Arizona in March, 1943, \$13,896.65 which she states was the balance of the \$14,500.00 paid her by the defendant remaining on hand on her arrival in Phoenix. Between the first of March and the last of June, 1943, there do not appear to be any deposits to the account, and all withdrawals were from the original deposit. On the last of June, 1943, the balance was \$11,679.40 (291). In July there were \$231.00 in deposits to the account which she testified were from her husband's earnings and other sources. Her balance on the last day of July was \$11,625.14 (292). This was the month immediately preceding the time she discovered she had a fractured hip. In August apparently there were no deposits, but there were heavy withdrawals on account of the purchase by the plaintiffs of a home. Her balance at the end of August was \$5,044.08 (293). Her balance at the end of September, 1943, was \$3,376.24 (294). (There were some deposits during September.) At the end of October her balance was \$2,905.85 (296), at the end of November, \$2,298.41 (297). We make note of these balances of September, October and November because according to her testimony during those months she was operated upon and was under treatment by Dr. Lytton-Smith and expended some moneys on account thereof. The statements of the months December, 1943, to and including November, 1944 (297-306) show

many deposits to the bank account and continued expenditures and withdrawals. Her bank balance at the end of November, 1944, (just previous to the filing of this suit) was \$208.01 (306). Her balance at the last of December, 1944, was \$149.27 (307).

From the testimony of Mrs. Zane (268-314) and from the testimony of Mr. Zane (251-259) it appears that some portion of this \$14,500.00 was expended by plaintiffs for a home and furnishings, and some portion for Defense Bonds, most of said Defense Bonds having been cashed and expended before the trial of the action. Most of the balance of the money was expended for such things as new automobiles, jewelry, luxuries of all kinds, loans to friends, unexplained moneys paid to Jack Zane, a fine assessed against Jack Zane in a criminal court, and other things wholly unrelated to any cure or treatment of the plaintiff, Zoa Zane.

We believe the foregoing summary of uncontradicted evidence will give the Court a sound basis to follow the argument made by appellant. There is contradictory evidence and some other undisputed facts, but we believe the recitation of the same under this heading would result in unnecessary repetition—such facts can be better handled in the argument.

IV.

SPECIFICATIONS OF ERROR

No. 1. The court erred in denying defendant's motion for a directed verdict in its favor made at the close of all the evidence (444-446) and in denying defendant's motion

for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict (61-62) (denied—67) made pursuant to Rule 50 of the Rules of Civil Procedure for the District Courts of the United States, upon the following grounds and for the following reasons:

(a) The evidence is insufficient to sustain any cause of action in favor of the plaintiffs and is insufficient to support the verdict or the judgment rendered in accordance with the verdict, and the verdict and the judgment are not justified by the evidence and are contrary to the evidence and the law.

(b) It affirmatively appears from the evidence that a proper and legal release was signed and executed by the plaintiffs and delivered to the defendant in consideration of the payment of a substantial sum by defendant to plaintiffs, releasing and discharging the defendant from any and all claims, demands which the plaintiffs had at the time of the execution of the release, or may thereafter have on account of or arising out of the accident in question in this case (143-144).

(c) That such release expressly states that it extends to all claims of every nature and kind whatever, known or unknown, suspected or unsuspected, and the plaintiffs expressly waived all rights under Section 1542 of the Civil Code of California, the terms of said Section being set out in the said release.

(d) That in addition to said release plaintiffs received and endorsed two drafts, one in the sum of Fourteen Thousand Five Hundred (\$14,500.00) Dollars (147-150), and one in the sum of Fourteen Hundred Sixty-seven (\$1,467.00) Dollars (151-153), releasing and discharging the defendant from any and all claims and demands of the plaintiffs on account of the accident in question in this case.

(e) That there was no evidence showing any intentional fraud on the part of the defendant or any of its agents in procuring the releases, and there was no evidence of any false representation intentionally or knowingly made by any agent of the defendant intended to induce the plaintiffs to execute the release.

(f) That if any false representation was made by any person, there was no competent evidence that such person was an agent authorized to bind the defendant by such a representation.

(g) That if any false representation was made by any person, there was no evidence that the plaintiffs should have relied upon the same or had the right to rely upon it.

(h) That there was no evidence of constructive fraud or mutual mistake sufficient to set aside or rescind a release.

(i) That if there was constructive fraud or mutual mistake, the terms of the release expressly cover the same.

(j) That although plaintiffs seek to rescind a release, they have never offered restitution of the benefits received by them from the defendant on account of the release.

(k) That plaintiffs had expended all the moneys received by them from the defendant before filing this action, and only a small portion was expended in the treatment and cure of the plaintiff, Zoa Zane, of injuries received by her, which were unknown at the time of the execution of the release.

(l) That it affirmatively appears from the evidence that plaintiffs gave defendant no notice of rescission of the release until the filing of this action, although plaintiffs were notified of the additional injuries received by plaintiff, Zoa Zane, and which were unknown

at the date of release, more than one year before the institution of the action, and knew of the alleged false representations during all of that time.

(m) That it affirmatively appears from the evidence that after plaintiffs had knowledge of the additional injuries and after they had knowledge of the falsity of alleged representations made to them by an alleged agent of the defendant, they retained the benefits received by them from the defendant on account of the release, and continued to expend the moneys received by them without notice to the defendant of any defect in the release.

(n) That the defendant was greatly prejudiced by the laches on the part of the plaintiffs and the plaintiffs are estopped and barred from now claiming that the release was obtained through fraud or mistake.

No. 2. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection and motion to strike of the defendant, to testify as follows:

"Q. And were you under the influence of any anaesthetic then?

A. Well, I had locals and they were partly worn off. I was rational then. They took me into the room. I saw it was empty and I made some comment about a private room and the nurse said, 'You have nothing to worry about it as the Greyhound will pay for this.'

Mr. Baker: We move to strike that part of the answer on the ground it is purely hearsay and irrelevant." (90-91)

in that there is no sufficient evidence that some nurse at a hospital was an agent of the defendant, and any statement made by such nurse was purely hearsay.

No. 3. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection and motion to strike of the defendant, to testify as follows:

"Q. And when you saw Dr. Blackman did you have a conversation with him?

A. Yes. I told him what the nurse told me and asked him if that was right and he said. 'Yes, all you have to worry about is to get well.' He (18) said, 'You don't need to worry about the bills, that they will be taken care of.'

Mr. Baker: "We move to strike that evidence on the grounds previously assigned." (92)

in that there was no sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his authority, or authorized to bind the defendant, and any statement made by Dr. Blackman is purely hearsay.

No. 4. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection of the defendant, to testify as follows:

"Q. Now, I believe you stated that from some talk with Mr. Cameron—did you ever have any talks with Mr. Cameron and Dr. Blackman regarding an artificial limb?

A. Yes, I did talk to both of them about it.

Q. About when was that?

A. Well, it was probably the last part of January.

Q. And that was prior to the settlement?

A. Yes.

Q. And will you state what was said at that time, what the conversation was?

Mr. Baker: The same objection we have heretofore made on conversations with either Dr. Blackman and Mr. Cameron.

The Court: You may answer.

(The question was read by the reporter.)

The Witness: Well, they were both in the room together at one time.

Mr. Stahl: That was in your room?

A. Yes, sir; and then they were telling of the people they knew that had artificial limbs, and they both told me that as soon as I was up and had my strength back I would be able to wear an artificial limb and be as good as new, and the only injuries I had was the amputation of my right foot, lower leg.

Q. And do you recall that they had anything with them regarding artificial limbs at that time, or was that later?

A. I think the doctor brought back in one when he was alone, had a pamphlet.

Q. When was that?

A. Well, I think it was even—it was before Mr. Cameron and the doctor were in the room together.

Q. What did he have with him then?

A. He had a pamphlet showing a party who had had an artificial limb high jumping, and he was advertising some brace company that made artificial limbs.

Q. Showing these people using artificial limbs?

A. Yes. He said I would be able to do the same as soon as I was up and could wear an artificial limb.

Q. Now, did you—prior to that time did you have any talks with Dr. Blackman regarding the extent of your injuries?

A. Oh, yes, several times I asked him about (36) my injuries and he always assured me that that was all that was the matter with me, was just the amputation of my right foot and lower leg and a fractured left ankle, which was minor." (105-107)

in that there was not sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his authority, or authorized to bind the defendant, and there was no evidence that Mr. Cameron was such an agent of the defendant, authorized to make statements for or in behalf of the defendant concerning the physical condition of any person, and the statements made to the plaintiff were purely hearsay insofar as the defendant is concerned.

No. 5. The court erred in permitting the plaintiff, Jack Zane, over the objection of the defendant, to testify as follows:

"Mr. Carson: What did he say in regard to—
What did Dr. Blackman say in regard to the use of
an artificial limb, if he said anything?"

Mr. Baker: We object to that on the ground it is
hearsay as far as the Defendant is concerned.

The Court: All right. He may answer.

Mr. Carson: Do you remember what he said, Jack?

A. Well, he said she would be able to use an
artificial limb; there was no other injuries." (200)

in that there was no sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his employment or authorized to bind the defendant, and any statements made by him to the plaintiff were purely hearsay insofar as the defendant is concerned.

No. 6. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 2 (42-43), and over the objection and exception of the defendant (460-461), to wit:-

You are instructed, that if you find from a preponderance of the evidence that, prior to the execution of the release introduced in evidence, an agent

or agents of the defendant represented to the plaintiff, Zoa H. Zane, that her only injury was the injury to her right foot and lower right leg, which necessitated the amputation of said leg below the knee, and that she had not sustained any other injuries, and that she would be able to use an artificial limb and avoid the use of crutches, and if you further find from a preponderance of the evidence that said representations were not true and that plaintiffs believed the same and relied thereon, and that had it not been for such representations and such belief and reliance, the plaintiffs would not have executed said release, then, although said agent or agents did not know that said representations were not true at the time they were made, and although there was no fraud or wrongful intent on the part of said agent or agents to deceive or defraud said plaintiff, the plaintiffs are not bound by said release so far as the injuries to the right femur or thigh bone of said plaintiff, Zoa H. Zane, and the results and consequences thereof, are concerned, and the plaintiffs can recover for such injuries and the results and consequences thereof if you find from a preponderance of the evidence that the negligence of the defendant was the proximate cause of said injuries. (447-448)

upon the grounds and for the reasons that the same does not properly state the law applicable to the facts of this case in that it fails to give proper or any effect to the written release admitted and proven in the case and assumes that the release is partially effective and partially void, and is not rescinded in its entirety, and further instructs the jury that plaintiffs are entitled to recover and to set aside the release because of representations made by agents of the defendant claimed to be false, although such falsity

was unknown to the agents, and there was no intentional fraud. Furthermore, it gives no consideration to the admitted fact that plaintiffs had been paid a large sum by the defendant for injuries received in the accident in question, and does not instruct the jury to give credit for such payment; and, furthermore, said instruction conflicts with other instructions given by the court and was confusing and misleading to the jury.

No. 7. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 5 (44-45) and over the objection and exception of the defendant (461) to wit:

You are instructed that if you find from the evidence that, prior to the execution of the release introduced in evidence, Dr. Blackman represented to the plaintiff, Zoa H. Zane, that the only injuries she had sustained as a result of the accident were the injuries to her right lower leg and foot that necessitated the amputation, and that said plaintiff could use an artificial limb, and if you further find from the evidence that said representations were not true and that said plaintiff, as a result of said accident, sustained a fracture of her right femur or thigh bone resulting in a non-union of said bone with the hip bone, and that said plaintiff could not and cannot use an artificial limb, and if you further find that said representations were believed and relied upon by the plaintiffs, and if you further find that the claim agent of said defendant knew of, approved and ratified said representations, and that the defendant approved the settlement and accepted the benefits thereof, then the defendant is stopped from claiming that said representations cannot be attributed to it, and said release is not a bar to this action.
(448-449)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further grounds that said instruction assumes and instructs the jury that one Dr. Blackman was the authorized agent of the defendant and the defendant is bound by his representations; and, furthermore, assumes that the defendant accepted or received benefits from the execution of the release; and, furthermore, instructs the jury that the plaintiffs are entitled to recover merely because certain representations were later proved to be not true.

No. 8. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 6 (45-46), and over the objection and exception of the defendant (461-462), to-wit:

You are instructed that if you find from a preponderance of the evidence that the claim agent of the defendant, prior to the signing by the plaintiffs of the release relied on by the defendant, had left with the plaintiff, Zoa H. Zane, a form of release in which the consideration was stated to be \$14,500.00 and in which the accident was stated to have resulted in the loss of said plaintiff's right foot and lower leg, and if you further find from the evidence that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff and that as a result said plaintiff signed said release introduced in evidence, then said release is no defense in this suit and your verdict should be for the plaintiffs for such damages as you may find the plaintiffs have sustained by reason of and as a result of the injury to the right femur or thigh bone of the plaintiff, Zoa H. Zane, if you further find from a preponderance of the evi-

dence that the accident was caused by the negligence of the defendant and that such negligence was the proximate cause of said injury. (449-450)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further ground that in said instruction the court substantially instructs the jury that the form of release signed and executed by the plaintiffs was not the same form first submitted to them, which is an unjustified conclusion on the part of the court; and, furthermore, said instruction assumes that there was intentional fraud on the part of the agent of the defendant without reciting the elements necessary to constitute intentional fraud, and without proof to sustain intentional fraud; and in said instruction the court instructs the jury that the mere fact standing alone of a release signed and executed by plaintiffs being different from a form of release originally submitted to them entitled the plaintiffs to set aside the executed release and to recover.

No. 9. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 10 (48-49), and over the objection and exception of the defendant (462), to-wit:

You are instructed that if you find for the plaintiffs, then it is your duty to fix the amount of damages as shown by the evidence relative thereto. In fixing the amount of such damages, if any, you may take into consideration the age of the plaintiff, Zoa H. Zane, the extent of the injuries, if any, to the right femur or thigh bone of said plaintiff, and the results and consequences thereof, her physical and mental pain, suffering and inconvenience already endured, if any, and that she may endure in the future as a result of such

injury, if any, and the character of such injury, whether temporary or permanent; you may also consider any reasonable expense incurred in the treatment of said injury and her inability, if any, to work and earn money, and to perform her duties and to engage in gainful pursuits, and any impairment of her physical powers and any limitations placed upon her in the enjoyment of her physical faculties by reason of said injury, and allow such sum as will under the evidence compensate the plaintiffs for said injury, not, however, exceeding the sum of \$51,565, the amount asked for by the plaintiffs in their complaint. (450-451)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further grounds and reasons that the court assumed that the plaintiffs were entitled to recover for injuries to the right femur or thigh bone of the plaintiff, Zoa H. Zane, separately from other injuries received by the plaintiff in the accident and without giving consideration to such other injuries and without instructing the jury that it must give credit to the defendant for the amounts paid the plaintiffs for such other injuries.

No. 10. The court erred in refusing, over the exception and objection of defendant (462), Defendant's Requested Instruction No. 2, reading as follows:

You are instructed that the plaintiffs in this case assert and testify that at the time they signed and executed the written release which is in evidence they did not know that the plaintiff, Zoa Zane, had suffered injuries to her right hip and possibly other injuries and assumed that her only injury was the amputation of her right leg below the knee.

In this respect, you are instructed that the release in question contains, among other provisions, the following clause:

"It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived."

The plaintiff, Zoa Zane, knew generally when she signed the release what it meant and that its effect was to bar her right to sue for any injuries received by her in the bus accident in question although she did not know of or suspect such injuries, or if she attached her signature to said release carelessly and with indifference to her rights and without making any effort to determine the contents of said release then the release must be upheld and the plaintiffs are precluded from recovering in this action unless you find from clear, convincing, and satisfactory evidence that the plaintiffs were induced to sign the release by intentional fraud and deceit on the part of the defendant as I have defined fraud and deceit in other instructions given you in this case.

(49-50)

upon the ground and for the reason that the same properly states the law applicable to this case, and the defendant was entitled to such instruction and was prejudiced by the refusal of the court to give the same, and in refusing such instruction the court in substance instructed the jury that the release signed and executed by the plaintiffs was of no force or effect.

No. 11. The court erred in refusing, over the exception and objection of defendant (463), Defendant's Requested Instruction No. 6, reading as follows:

You are instructed that although you may find that plaintiff, Zoa Zane's, hip was fractured in the bus

accident, and it was falsely represented to her that there was no fracture of the hip, yet the falsity of such representation, if any, will not entitle the plaintiffs to recover unless they go further and prove to your satisfaction by clear and convincing evidence that the falsity of such representation was known to the person making the same at the time he made it, and that he knowingly made a false representation for the purpose of inducing the plaintiffs to execute the release in question, and that plaintiffs relied upon the same. (53)

upon the grounds and for the reason that the same properly states the law applicable to this case, and the defendant was entitled to such instruction and was prejudiced by the refusal of the court to give the same; and upon the ground that although plaintiffs in their complaint and under their requested instructions which were given to the jury sought to recover from this defendant both on the grounds of intentional fraud and constructive fraud, nevertheless the court refused to instruct the jury as to the burden of proof required of the plaintiffs to establish intentional fraud.

No. 12. The court erred in refusing, over the exception and objection of defendant (463), Defendant's Requested Instruction No. 9, reading as follows:

You are instructed that although you may find from a preponderance of the evidence that the relation of principal and agent did exist to some extent between the defendant company and Dr. Blackman, and statements were made by such doctor to plaintiffs, or one of them, but that said Dr. Blackman was without authority to represent the defendant in the negotiation of a settlement with and a release from the plaintiffs on account of injuries incurred, and

such statements were not made for the purpose of influencing the plaintiffs in making a settlement, a release subsequently negotiated by an agent of the defendant company without knowledge on his part of the statements made by the doctor cannot be avoided by reason of such statements. (55)

upon the grounds and for the reason that the said requested instruction correctly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same; and upon the further grounds and reasons that in refusing to give said instruction the court left the convincing inference with the jury that Dr. Blackman was the agent for the defendant for all purposes and the defendant was bound by any statements or representations made by him, although he was not authorized to make such statements and the defendant had no knowledge of the same.

No. 13. The court erred in refusing, over the exception and objection of defendant (463-464), Defendant's Requested Instruction No. 13, reading as follows:

Even though you should find from the evidence that there were false representations made to the plaintiffs, and that they were induced thereby to accept the money and execute the release, yet if you should further find from the evidence that they failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, and continued to retain and use the consideration paid them for the release for an unreasonable length of time after discovery of the fraud, then the plaintiffs are deemed to have ratified the release, and they cannot now set aside the re-

lease, and under such a state of facts your verdict must be for the defendant. (57)

upon the grounds and for the reason that said requested instruction properly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same, and upon the further ground that the undisputed evidence shows that the plaintiffs expended all of the money paid to them by the defendant on account of the release in evidence without giving any notice of rescission of the release and without tendering the return or repayment to the defendant of the moneys received by the plaintiffs, and that after plaintiffs had actual notice that the plaintiff, Zoa Zane, had injuries unknown at time of release, the plaintiffs continued to expend the moneys received by them for the release without notice of rescission or offer to return or repay the moneys to the defendant.

No. 14. The court erred in refusing, over the exception and objection of defendant (464), Defendant's Requested Instruction No. 14, reading as follows:

You are instructed that if you should find from a preponderance of the evidence that the plaintiffs in this case are entitled to recover, and the release should be set aside and voided, but that the plaintiffs are unable to make restitution to the defendant of the amount or amounts received by them on account of said release, then the defendant is entitled to receive full credit for the amount paid by it to the plaintiffs for said release. In other words, if you should find for the plaintiffs, in arriving at your verdict for damages, if any, to which they are entitled you must first deduct all amounts received by

them from the defendant on account of the release in question. (58)

upon the grounds and for the reason that said requested instruction properly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same, and upon the further grounds and reason that in refusing said instruction the court substantially instructed the jury that the plaintiffs were entitled to any amount of damages without any credit whatever to the defendant for amounts previously paid by the defendant to the plaintiffs, and without making any deduction from the verdict on account of amounts previously paid by the defendant to the plaintiffs.

No. 15. The court erred in giving all of its instructions to the jury (447-459), upon the grounds and for the reasons that the court by repetition unduly accentuated the plaintiffs' theory of the case, and although the plaintiffs in their complaint sought to recover on several grounds including intentional fraud, constructive fraud, and upon Section 1542 of the Civil Code of California, yet the court in its instructions did not distinguish between these different grounds and theories nor explain nor define the same, and in giving the various instructions did not state to what ground or theory the same were applicable. Therefore, the instructions as a whole were conflicting, confusing, and misleading to the jury.

No. 16. The court erred in denying defendant's alternative motion for new trial (62-65, 67) upon the grounds and for the reasons set forth in Specifications of Error Nos. 1 to 15, inclusive.

V.

ARGUMENT

- I. The written release received in evidence is a binding obligation releasing defendant from all injuries received by Zoa Zane, known or unknown, and cannot be set aside on grounds of mistake or "constructive" fraud.

(Specification of Error No. 1, paragraphs a-d, h-i)

The release in question, although designated by plaintiffs in their complaint as a "general" release, is not such, but is express, specific, and detailed. It not only provides that defendant is released "of and from any and all claims and demands which we now have or may hereafter have" but also in separate paragraphs provides that the release applies to all claims of every nature and kind, known or unknown, suspected or unsuspected, and plaintiffs expressly waive all provisions of Section 1542 of the Civil Code of California, the terms of which are quoted (143-144). It is true that plaintiffs withdrew their requested instruction No. 7 (46-47) based upon the Section of the California Code and apparently thereby abandoned their theory of recovering upon such statute, nevertheless, it might be well to review the decisions of the California courts construing such statute.

In *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, the Supreme Court held that a "general" release did not bar an action for the recovery of injuries unknown to claimant at the time of the release. But in that case the release did not contain a clause stating it applied to all known and unknown, suspected and unsuspected injuries or a clause expressly waiving all rights under said Section 1542. In *Hudgins v. Standard Oil Company*, 136 Cal. App. 44, 28 P. 2d 433, the release in question did contain the clauses above

mentioned but as stated in *Berry v. Struble*, *infra*, it is very clear that the District Court of Appeal in the *Hudgins* case gave no consideration to the effect of said clauses and the same was not brought to the court's attention. In *Berry v. Struble*, 20 Cal. App. (2d) 299, 66 P. 2d 746, the California court held that where substantial compensation is paid to a claimant, and in consideration thereof he executes a release specifically providing that the same covers all "known and unknown" injuries, he cannot thereafter rescind the release and recover for injuries which he did not know to exist at the time. In that respect the court stated (reading page 747 of the Pacific Reporter):

"There does not appear to be any principle of public policy which, in the absence of fraud or duress, would forbid parties who are laboring under no disability from releasing for a consideration all claims arising from a particular accident, whether the injuries be known or unknown."

It is an established rule of law that where it appears from the terms of a release that it was the intention of the parties to discharge a person of all known or unknown claims arising from an accident, in the absence of actual and intentional fraud, the injured person cannot rescind the agreement and recover for injuries unknown at the time the release was executed.

Jordan v. Guerra (Cal. App.) 136 P. 2d 367;
Berry v. Struble, *supra*.

The California statute referred to apparently permits, in a case where there is nothing but a general release taken, a recovery for injuries unknown at the time of the execution of the release, although there were no false statements

or representations made to the claimant by an agent of the releasee which induced or affected the execution of the same. In view of the specific terms of the release in question in this case, the plaintiffs, while in their complaint they relied upon the California statute, apparently decided to abandon that theory and withdrew from the jury any instructions based on the California statute. As the case was finally submitted to the jury, it was, as we understand it, on two theories: First, that certain representations were made to the plaintiffs that Zoa Zane had no injuries to her hip and no injuries which would incapacitate her from using an artificial limb; that plaintiffs relied upon such statements in executing the release; that such statements were false and that although the person or persons making such statements acted innocently and did not know of their falsity and believed the statements to be true, nevertheless, plaintiffs are entitled to recover. Second, in one instruction requested by plaintiffs and given by the court, the plaintiffs advanced the theory that the mere fact, if such be true, that a claim agent submits one form of release to a claimant but the release actually executed is different in wording than that originally submitted, entitles the claimant to absolutely rescind the executed release. This theory, if it has any soundness whatever, is apparently based upon intentional and actual fraud. At this time we will give consideration to the first theory.

In support of such first theory plaintiffs in the court below relied almost entirely upon a decision of the Supreme Court of the State of Arizona in *Atchison, etc., Ry Co. v. Peterson*, 34 Ariz. 292, 271 P. 406. It is contended that the Supreme Court of Arizona has established the rule that a

claimant in the face of a general release can recover for injuries unknown to him at the time he executed the release where statements are made to him which afterward develop to be false, although the statements were innocently made without knowledge of falsity on the part of the person making the same. This has quite often been referred to by courts as "constructive" fraud. As a matter of fact it is nothing more than mutual mistake. This is established by the Supreme Court of Minnesota in *Jacobson v. Chicago M. and St. P. Ry Co.*, 132 Minn. 181, 156 N. W. 251, which is relied upon by the Supreme Court of Arizona, in arriving at its conclusions in the Peterson case. The Minnesota court said:

"In such cases the courts grant relief either upon the ground of fraud in law, sometimes spoken of as constructive fraud, or mutual mistake. It is not material whether it be termed fraud in law or mistake; the result is the same in either case."

The *Peterson* case is clearly distinguishable from the case at bar. In the first place, the terms of the release which was executed in the *Peterson* case were given no consideration nor recited nor mentioned in the decision and it is quite evident no point was made before the Supreme Court of the effect of specific and express terms of the release covering unknown and unsuspected injuries, if there were any such terms. Apparently from the decision the release must have been one very general in its terms. It is to be kept in mind that there was no proof whatever that the statements alleged to have been made to the plaintiffs, or one of them, by Dr. Blackman and Mr. Cameron, or one of them, that the only in-

juries received by her were those necessitating the amputation of her right leg below the knee and there was no injury to her hip and she could use an artificial limb, were known to be false. There is no evidence that either of said persons knowingly made a false statement. According to the record such statements made by said persons were wholly innocent and they believed them to be true. By the overwhelming authority if a settlement is made with a person *sui juris* and in his right mind, and a release is executed which *clearly and expressly is intended to cover all known and unknown, suspected and unsuspected injuries resulting from an accident, and is clearly intended to cover "constructive" fraud or mistake,* the claimant is barred and estopped from thereafter recovering for unknown and unsuspected injuries although it afterwards develops that the statements and representations made to the claimant were absolutely false. This is the rule even in Minnesota, the decision of whose Supreme Court is relied upon by the Supreme Court of Arizona in the *Peterson* case.

Hanson v. Northern States Power Co., 198 Minn. 24, 268 N. W. 642;

Moses vs. Carver, 298 N. Y. Supp. 378, 164 Misc. 204;

Hoffman v. Eastern Wisconsin R. & Light Co., 134 Wis. 603, 115 N. W. 383;

Quebe v. Gulf C. & S. F. R. Co., 98 Texas 6, 81 S. W. 20.

In addition to the specific and complete release, defendant's Exhibit B, the plaintiffs signed and executed

two other written releases, defendant's Exhibit C (147) and D (151).

Such exhibits are the vouchers by which the plaintiffs were paid the amounts they demanded for the release. Each voucher contains a complete release of all the injuries resulting from the accident. Each release was specifically signed by the plaintiffs and was not designed to be effective merely by endorsement of the vouchers. While the releases contained in the vouchers are quite general and not as specific and detailed as the main release, nevertheless, they clearly show the intent of the plaintiffs to accept the amounts named in full settlement of all injuries received in the accident.

This case should not have gone beyond the point where it was apparent that no intentional false statement was made to the plaintiffs, and the court should have granted the motion for instructed verdict made at the close of plaintiffs' testimony; in any event, should have granted the motion for instructed verdict made at the close of all the evidence, and if the court desired to take it under advisement, as allowed by the rule, certainly defendant's motion for judgment notwithstanding the verdict, should have been granted.

II. There was no intentional or actual fraud on the part of the defendant.

(Specification of Error No. 1, paragraph e)

Solely for the purpose of this paragraph of the argument, we will assume that the evidence was sufficient to establish agency between Dr. Blackman and Mr. Cameron and the defendant. Dr. Blackman was the physician who attended Mrs. Zane at the Indio hospital and Mr. Cameron

was a claim agent. It was the representations of these two men which Mrs. Zane claims induced her to sign the release.

Mrs. Zane was in the Indio hospital under Dr. Blackman's care from December 11, 1942, to March 8, 1943—almost three months. As stated in the SUMMARY OF UNDISPUTED FACTS, there was no effort on the part of the alleged agents of the defendant to hurry or rush the plaintiffs into a settlement, and there was no effort to induce them to accept a trifling or nominal sum. The first offer made by defendant to plaintiff was \$12,000.00, which is certainly substantial (137). There was no effort to isolate Mrs. Zane or to prevent her from consulting persons whom she desired to consult. Mr. Cameron would not deal with Mrs. Zane without the approval of her husband, and at all times urged her to confer with him. He would not accept a release except one executed by the husband in his, Cameron's, presence (141). For the first three weeks that Mrs. Zane was in the hospital, Cameron never discussed the matter of settlement. He was merely solicitous of her welfare (131-135). The first discussion of settlement was after the second operation which was about six weeks after she entered the hospital (136).

A very potent fact is that Cameron was not with the plaintiffs at the time they decided upon what amount they would accept, and could not possibly have influenced them in arriving at such amount (138-140). The plaintiffs themselves, in the absence of Cameron, Dr. Blackman, or any other person, decided that \$15,000.00 was a proper amount to accept for the injuries to Mrs. Zane and their minor child. Mrs. Zane, with the approval of

her husband, sent a telegram to Cameron in Los Angeles, stating they would accept \$15,000.00 plus hospital expenses (defendant's Exhibit A-139). *Mrs. Zane admits that plaintiffs were paid every dollar they demanded without any further maneuvering or dickering on the part of the defendant* (139-140). This indicates that the plaintiffs and not the defendant were the persons anxious to effect a speedy settlement. This is further brought out by the facts that the telegram was sent on January 29, 1943—Cameron, soon after receiving the same, went to Indio and accepted plaintiffs' offer—as the husband was not present, he left a form of release to be studied and discussed by the plaintiffs.—Thereafter he made no effort to hurry the plaintiffs into a settlement.—It was February 19th before the release was finally executed (141-142). Certainly such facts do not indicate that Cameron thought he was making a settlement which was advantageous and beneficial to the defendant. If he thought the settlement was to the great advantage and benefit of the company, he would have been pressing and urging a speedy execution of the release. On the contrary, his actions indicate that he thought the company was paying the plaintiffs a very large amount and did not seem to care whether the plaintiffs accepted settlement or not.

It is not claimed that Cameron had any knowledge of medicine and, of course, it was apparent that any statements made by him were solely based upon statements of Dr. Blackman. Cameron had no reason to intentionally make a false statement—at no time did he endeavor to induce plaintiffs to accept some small or nominal amount—at no time did he deny liability upon the part of the

defendant company, but on the contrary acknowledged full responsibility for the accident. The amount paid the plaintiffs was substantial. While there is no express testimony to that effect, nevertheless, it is very apparent from all the facts that even if plaintiffs knew that Mrs. Zane had a fractured hip, they still would have accepted \$14,500.00 plus medical expenses for her injuries.

As to Dr. Blackman, there is not even a remote inference that he had any reason and/or object in concealing injuries from the plaintiffs. He was not on a salary with the defendant for the purpose of treating injured passengers, but received pay at the regular rates charged by physicians for all work performed by him, and according to defendant's Exhibit D (151-154), his charges were not small. If he had known that she had an injured hip, certainly he would have treated the same because that would have added to his remuneration.

From Dr. Blackman's deposition (359-407) it appears not only he did not know of the fractured hip at the time Mrs. Zane was in his hospital, but also in spite of subsequent developments showing that in August, 1943, she had a fractured hip, he is quite definitely of the opinion such fracture did not exist while she was in the hospital. He made the usual examination of Mrs. Zane, including a complete examination of the hip region and pelvis. There was no movement of the thigh or shortening suggestive of fracture. He frequently moved and activated her right leg and there was no complaint of pain in the hip, no muscle spasm about the hip which indicated fracture. For such reason he took no X-ray of the hip and was satisfied that there was no fracture (368-369). Plaintiff's

physician, Dr. Lytton-Smith, said under the same circumstances he would not have taken an X-ray of the hip region (228).

Another very potent fact is that Dr. Blackman performed a second operation to repair the stump of Mrs. Zane's leg, and the sole object of that operation was for the purpose of adjusting and fitting the leg to an artificial limb. Certainly, Dr. Blackman would not have repaired the stump to allow the use of an artificial limb if he knew Mrs. Zane had a fractured hip. It is admitted by all the medical witnesses, Dr. Blackman (407), and Dr. Lytton-Smith (229) that a fractured hip, unless repaired and made sound, will not bear the weight of an artificial limb. No physician will perform an operation for the purpose of adjusting a leg to the use of an appliance that would immediately and definitely disclose another injury which he was attempting to conceal.

Dr. Lytton-Smith testified that had he administered treatment to Mrs. Zane as described by Dr. Blackman in his deposition, and had observed the same results, he would have reached the conclusion that there was no fracture of the hip at that time (228-229). He also testified that had he discovered any evidence of fracture in the hip region, he would not have performed the operation to repair the stump (229-230).

We think the evidence is very persuasive that the fracture of the femur discovered in August, 1943, did not exist while Mrs. Zane was in the Indio hospital; and it is conclusive that if it did exist, it was not known to or noticed by Dr. Blackman, and his statements as to the same were wholly innocent. Of course, any statements

by Mr. Cameron based upon information given by Dr. Blackman would also be innocent.

The only other evidence remotely inferring intentional fraud is the testimony of Mrs. Zane that the form of release left with her by Mr. Cameron after she sent the telegram, defendant's Exhibit A, was not the same as the one introduced in evidence, defendant's Exhibit B, in that two of the blanks in the printed form were filled in with different wording (175-176). This is indeed strange. The evidence is that Cameron left this form of release with Mrs. Zane two or three days after January 29th and it remained in her possession until the very time that a release was signed. There is no evidence that Cameron, when he came to Indio on February 19th, brought another release with him—there is no evidence that he ever had this original form of release in his possession after delivering the same to Mrs. Zane. The inference is that Cameron immediately at the time the release was to be executed, by "hocus pocus," sleight of hand, or black magic, substituted another release for the one left with Mrs. Zane. This is ridiculous.

Such a statement becomes more than ridiculous when you consider the following admitted facts: Mrs. Zane claims that in the form left with her the blank space following the printed words, "resulting in" was filled in with the words, "loss of right foot and lower leg" instead of the words, "personal injuries and property damage" as are in the executed release, defendant's Exhibit B. (Compare defendant's Exhibit E—177, with Exhibit B.) In this accident she also received a fractured left ankle which was known to all parties concerned and which was treated and reduced at the hospital (179). It is beyond comprehension

that any claim agent would specify one known injury in a release and omit another known injury. Mrs. Zane testified in the printed form first submitted to her the blank for the amount of compensation paid was filled in with \$14,500.00 instead of \$15,967.00. It is unexplainable as to why a claim agent should state that amount paid as being \$14,500.00 when in fact the company was paying \$15,967.00 which included the medical expenses. *Is this clear, convincing and satisfactory evidence of fraud as required by the authorities?* Definitely it is not.

Rice v. Tissow, 57 Ariz. 230, 112 P. 2d 866.

Even admitting that the blank space in the original form of release stated the injuries to be loss of right foot and lower leg, that could make no difference in the determination of this case. Mrs. Zane testifies that the form left with her was identical with the form finally executed except for the filling in of the blank spaces (175). All printed matter contained in the final release was in the original form. As the final release, defendant's Exhibit B, is not incorporated in the printed record by photostatic copy, the court will have to refer to the original, which is in the possession of the Clerk of this Court, to determine exactly what is printed and what is written in script. The releasing clauses are all printed, as well as the clause stating that claimants understand and agree that the release extends to all claims of every nature and kind, known or unknown, suspected or unsuspected, and the clause waiving rights under Section 1542 of the Civil Code of California, and the recitation of the terms of such Section. Mrs. Zane testified that she well knew that the release left with her covered "all injuries known or unknown, or something to that effect"

(176). Under such circumstances, if the alleged original form of release was before us instead of the one actually executed, we would still have the same question of law.

We conclude that there was no clear, convincing and satisfactory evidence of actual and intentional fraud, and if there was, the release extended to all claims of every nature and kind and for a large sum of money paid to them, the plaintiffs agreed that the release covered all claims.

III. There was no competent evidence that a false representation was made by an agent authorized to bind the defendant and no competent evidence that the plaintiffs were entitled to rely upon any such representations.

(Specification of Error No. 1, paragraphs f and g)

The burden was upon the plaintiffs to prove by a preponderance of the evidence that a person making representations to them which were relied upon in executing the release was an agent of the defendant authorized to make the representations.

U. S. Smelting, etc., Co. v. Wallapai Mining Development Co., 27 Ariz. 126, 230 P. 1109.

Further, the burden is upon plaintiffs to prove not only that the person making the representation was an agent of the defendant, but that in making the same, he was acting within the scope of his agency.

45 Am. Jur., page 688.

Agency cannot be proved by declarations of the alleged agent or of a third person.

Bristol v. Moser, 55 Ariz. 185, 99 P. 2d 706.

Insofar as plaintiffs' testimony is concerned, there is no evidence of agency between Dr. Blackman and the defendant company except alleged declarations of Dr. Blackman himself and alleged declarations of Mr. Cameron, a claim agent. It is apparent from the testimony that plaintiffs well knew that Mr. Cameron was nothing but a claim agent for the defendant with limited authority, and he had to submit all major matters to the head office. There was no evidence indicating that Mr. Cameron had the right to employ a physician for the defendant or to bind the defendant by any statements concerning the employment of a physician. Therefore, any evidence introduced by the plaintiffs tending to show agency between Dr. Blackman and the defendant company was out of the mouth of the agent himself, which is not sufficient to establish agency.

The relationship between Dr. Blackman and the defendant company was established by the testimony of Mr. Earl F. Parks, Superintendent of Pacific Greyhound Lines. He testified that the only relationship between Dr. Blackman and the defendant was that he is on the medical staff of the Southern Pacific Company. The Southern Pacific Company being a minority stockholder in the Pacific Greyhound Lines, the employees of the defendant contribute \$1.75 a month towards the Hospital Association of the Southern Pacific Company, and if the employees of the defendant become ill, they are entitled to treatment by members of the medical staff of the Southern Pacific Company. If they are injured while on duty, then their cases fall under the State Compensation Acts and they select a doctor of their own choosing. There

is no provision for the treatment of passengers by doctors or hospitals. In case of an accident the injured passengers are taken to the nearest hospital where they can obtain medical attention, regardless of who or where or what it may be. Dr. Blackman is a private, practicing physician in Indio, California, and not retained by Pacific Greyhound Lines, and has no authority whatever to negotiate for the settlement of claims and no right whatever to make any representation to an injured passenger binding the defendant (347-351).

Mr. Cameron had no authority whatever to hire or employ Dr. Blackman, and his duties were restricted to investigation and adjusting claims (331-334).

In our opinion, the proof was wholly insufficient to establish any agency between the defendant and Dr. Blackman. Mr. Cameron was an agent of the defendant but for one purpose only—to adjust and settle claims of injured passengers. He had no authority whatever to employ physicians nor to bind the defendant by any statements concerning the employment of a physician. The plaintiffs well knew that Cameron was nothing but a claim agent and also well knew that Dr. Blackman was not on the payroll of the defendant. They themselves accepted and endorsed the voucher by which Dr. Blackman was paid for his services. They themselves paid all hospital and medical expenses incurred after the settlement. We think the evidence wholly insufficient to establish agency.

- IV. The failure of the plaintiffs to notify defendant of the rescission of the release, and the retention by them of the consideration received for the release after they had knowledge of the true facts estops and bars them from recovery in this case.

(Specification of Error No. 1, paragraphs j-m)

If it be true that Mrs. Zane sustained a fracture of her hip at the time of the accident, the evidence indicates that she should have had knowledge of the same before August, 1943. According to her testimony she definitely knew that she could not successfully use an artificial limb and that appears to be the main complaint of the plaintiffs. There is some testimony that she knew before she left the Indio hospital that her right leg was shorter than her left leg, and after she returned to Phoenix, she had continuous trouble and pain, and she never could successfully use an artificial limb. But during all of this time she did not notify the defendant, Dr. Blackman, or any other person of her troubles, and kept expending and using the moneys received for the release. In March, 1943, she had \$13,896.65 of the \$14,500.00 paid her which was deposited in the First National Bank of Arizona in Phoenix. Although in the month of July other deposits were made to her account, on the last day of July, 1943, she had only \$11,625.14 left (292).

In August, 1943, she had X-rays taken and was definitely informed that she had a fractured hip, and if any representations had been made to her, she definitely knew in August, 1943, that they were false (124). The exact date in August when she learned this fact is not certain. Therefore, we cannot fix the exact amount of moneys she had on the date she had the X-rays taken and learned of her

additional injuries, but we do know that on the last day of July she had \$11,625.14, and that in August there were no deposits to her account, and on the last day of August, 1943, she had \$5,044.08 (293). During August she spent a large amount of money buying a new home, furniture, etc.

Therefore, we know that she had at least \$5,000.00 of defendant's money at the time she discovered her additional injuries and the falsity of any representations made to her. She did not notify the defendant of the additional injuries, did not give notice of the rescission of the contract, nor offer restitution of moneys of the defendant still in her possession, but on the contrary retained such moneys and continued to expend them as she saw fit. No notice whatever was given to the defendant until the date suit was filed, December 9, 1944, more than fifteen months after she had definite and explicit notice of the additional injuries received by her.

Although there had been considerable moneys deposited to her account between August, 1943, and December, 1944, nevertheless, at the time she filed suit she had approximately \$200.00 in the bank (306, 307). The picture is evident: As long as they had money, the plaintiffs were not interested in additional recoveries, either because the fracture of the hip was not caused by the accident, or because they were well satisfied with the settlement in spite of the discovered injuries not known at the time of the release. Although Mr. Zane called Dr. Blackman in October, 1943, accusing him, in substance, of malpractice, no notice was given to defendant. When they ran out of money then they cast about to find some means of getting additional funds and fell upon the idea of bringing suit for that pur-

pose. As shown in SUMMARY OF UNDISPUTED FACTS, of the more than \$5000.00 of the defendant's moneys which plaintiffs had on the last day of August, 1943, not more than 10 per cent was expended on doctors, hospitals, etc., or in the treatment of Mrs. Zane for the additional injuries. The rest was spent for jewelry, automobiles, luxuries and what have you. It is well established that the retention of the consideration of a release by one sui juris, with knowledge of the facts, amounts to a ratification of the release where the retention is for an unreasonable length of time.

45 Am. Jur., page 690;

Chicago, etc., Ry. Co. v. Pierce (Seventh Circuit)

64 Fed. 293;

Anno. 76 A. L. R. 344.

In *Colorado Springs and I. Ry. Co. v. Huntling*, 66 Colo. 515, 181 P. 129, the facts are quite similar to the case at bar. The plaintiff in that case was injured on August 25, 1912, and on November 9th of the same year she executed a release. She charged that such release was induced and procured by reason of false and fraudulent representations on the part of the agents of the defendant, and also charged duress and undue influence. The suit was apparently filed on March 14, 1914. She received a check for \$900.00 in consideration of the release, which she did not cash until March, 1913, approximately fourteen months before suit was instituted. The Supreme Court of the State of Colorado held that the plaintiff had retained the moneys received by her on the settlement for an unreasonable length of time, and that defendant was entitled to an instructed verdict; the court in that respect saying (reading page 132) :

"If she were misled on any other matter relating to her injuries, except as to the exact location and nature of the fracture (which she claims to have discovered by X-ray examination of March, 1915), she knew the contrary prior to the filing of her complaint March 14, 1914, yet she took no steps to rescind the settlement and continued to check on the proceeds thereof for almost a year thereafter.

"By instruction No. 11 the jury was told that—

"Even though you should find from the evidence that there were false representations made to the plaintiff, and that she was induced by them to accept the money and execute the release, yet if you should further find from the evidence that she failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, she cannot now set aside said release, and on such a state of facts your verdict must be for the defendant."

"This is a correct statement of law, but inasmuch as this record conclusively shows that plaintiff did not rescind with reasonable diligence after she discovered, or ought to have discovered, the truth, there was no evidence upon which the jury could find for her under this rule.

"After she had recovered her health and usual mental condition so as to render her capable of comprehending the settlement made, she was bound either to affirm or disaffirm, and if she did not elect to disaffirm at once, that is, within a reasonable time, she must be considered as having elected to abide by the settlement. And having once, by her conduct, affirmed it, she could not afterwards disaffirm it."

Chicago, St. P. & K. C. Ry. Co. v. Pierce, 64 Fed. 293, 296, 12 C. C. A. 110, 113.

"At the close of the evidence defendant moved for a directed verdict upon several grounds, among others that there was no proof tending in any manner to avoid the bona fides of the release, and that the evidence conclusively showed that the plaintiff had fully ratified it. This motion was overruled. For the reasons given, it should have been sustained. The judgment is accordingly reversed with directions to the trial court to enter judgment of dismissal herein at the costs of plaintiff."

Even if it can be said that there was intentional fraud on the part of the defendant, the plaintiffs discovered the fraud more than 15 months before any notice was given to the defendant. The prejudice to the defendant is very apparent. By reason of the delay and jaches on the part of the plaintiffs, the defendant lost the testimony of the very important witness, Mr. Cameron. The uncontradicted testimony given by Mr. Frazee Burke shows that Cameron was in the employ of the company until approximately one year before the trial of the case, that is, he was in the employ of the company until the spring of 1944 (331). At that time he became mentally incompetent and is still in that condition (331-333). If plaintiffs had notified defendant of the intended rescission of the contract in August, 1943, and had brought action, defendant would have had the benefit of Mr. Cameron's testimony.

Under such circumstances, it must be said that the plaintiffs ratified the release after discovering the fraud, if there was any fraud, and are estopped and barred from recovery, and a verdict in favor of the defendant should have been directed by the court, or the motion for judgment notwithstanding the verdict granted.

V. The court allowed hearsay testimony to be introduced in behalf of plaintiffs which was harmful and prejudicial to defendant.

(Specifications of Error Nos. 2, 3, 4, and 5.)

Specification of Error No. 16.)

The court, over the objection and motion to strike of attorneys for defendant, permitted evidence to be introduced of a conversation between Mrs. Zane and an unidentified nurse to the effect that the defendant would pay all bills (90-91); a conversation between Dr. Blackman and Mrs. Zane to substantially the same effect (92); a conversation between Mrs. Zane and Dr. Blackman and Mr. Cameron to the effect that her only injury was the amputation of her lower right leg, and that she could wear an artificial limb (105-107); and a conversation between Dr. Blackman and Jack Zane to the effect that Mrs. Zane would be able to use an artificial limb (200). These conversations were all purely hearsay as to the defendant unless it was proved by a preponderance of the evidence that the persons making the same were authorized agents of the defendant and that such statements were made within the scope of the agency. First referring to the conversation between Mrs. Zane and some unidentified nurse set forth in Specification of Error No. 2, there was absolutely no evidence, remote or otherwise, of any agency between such nurse and the defendant.

Referring to conversations between the plaintiffs and Dr. Blackman and Mr. Cameron, we have fully discussed the same in paragraph III of this argument, our contention being that there should have been an instructed verdict in favor of the defendant upon the ground that

there was no competent evidence establishing relationship of agency between Dr. Blackman and the defendant, and no evidence that the alleged statements made by Mr. Cameron were within the scope of his agency. We do not deem it necessary to further elaborate on the subject.

We contend that if we were not entitled to an instructed verdict, nevertheless, the court should have granted our motion for a new trial by reason of the erroneous admission of this hearsay testimony.

VI. The court erred in giving instructions to the jury, at the request of the plaintiffs, which do not properly state the law applicable to the facts of this case.

(Specifications of Error Nos. 6, 7, 8 and 9.

The Court, according to plaintiffs' request No. 2, instructed the jury to the effect that if agents of the defendant represented to the plaintiff, Zoa Zane, that her only injury was that necessitating the amputation of her leg, and that she could successfully wear an artificial limb, and such representations were not true, that plaintiffs were bound by the release insofar as injuries to Zoa Zane's hip are concerned and that plaintiffs could recover for such injuries to the hip no matter if the agents did not know of the falsity of the representations, and no matter how innocently they acted. The instruction appears on pages 447 and 448 of the Transcript of Record and is set out in Specification of Error No. 6. The court again instructed the jury substantially to the same effect in accordance with plaintiffs' request No. 5, the instruction as given by the

court appearing on pages 448-449 of the Transcript of Record and is set out in Specification of Error No. 7.

As we have heretofore contended and argued in paragraph 1 of this argument, the release fully covered "constructive" fraud and "mutual mistake" and the court was not justified in submitting the case to the jury on those theories. If the court did allow the case to go to the jury on such theories, at least it should also have submitted to the jury the question of the effect of the terms of the release and also should have submitted to the jury the question as to whether the plaintiffs by the terms of the release intended to accept the sums paid them in settlement for all claims for all injuries received in the accident, known or unknown. This the court failed to do.

The instructions complained of in Specifications of Error Nos. 6 and 7 are particularly vicious in the following respects: These instructions are based upon so-called "constructive" fraud or mutual mistake and not upon Section 1542 of the Civil Code of California. If the case fell within the provisions of said Section 1542, under some California decisions it is not necessary to rescind the release in its entirety, but it is held that the release is not applicable to unknown injuries. The instructions in question, however, are based upon fraud, constructive or intentional, and in such event the release is void in its entirety. If the matter was to be submitted to the jury it should have been submitted on the ground that the release was void on account of fraud and the plaintiffs were entitled to recover for all injuries suffered in the accident, the jury giving credit for the amounts theretofore paid plaintiffs by the defendant. This is true under the rule laid down in *Atchison, etc., Ry. Co. v. Peterson*, supra, relied upon by plaintiffs.

The court, according to request No. 6 of the plaintiff, gave an instruction over the objection of the defendant, which instruction appears upon pages 449-450 of the Transcript of Record, and which is fully set out in Specification of Error No. 8, to the effect that if the claim agent of the defendant left a form of release in which the consideration was stated to be \$14,500.00 and in which the injuries sustained were stated to have been the loss of plaintiff's right foot and lower leg, and if the jury further find "that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff, and that as a result, said plaintiff signed said release introduced in evidence, then said release is no defense in this suit" and the verdict should be for the plaintiffs for such damages sustained by reason of a fractured hip. This matter is discussed under paragraph II of this argument, and we refer to the argument therein made. It is our contention that the evidence was not sufficient to support such a theory of intentional fraud on the part of the defendant. It is further our contention that if the matter was submitted to the jury, the instruction should have been full and complete. As it stands, the court is instructing the jury that the sole fact that the release executed by the plaintiffs is somewhat different than the form of release originally submitted justifies the jury in wholly disregarding the executed release. According to the instruction of the court, the jury should wholly disregard the executed release even if the changes between the same and the form originally submitted were

immaterial. The court also in said instruction charged the jury that they should wholly disregard the circumstances under which the final release was executed and it did not matter whether the final release was read or not read by the plaintiffs, but if there was any difference whatever between the release originally submitted and that finally signed, then the final release was wholly ineffective.

Again in this instruction the court tells the jury that although under this charge of so-called intentional fraud, the executed release was wholly void, nevertheless, in arriving at the amount of damages, *the jury should only give consideration to the damages suffered by plaintiffs on account of the injury to the hip, and should give no consideration whatever to other injuries received by plaintiff, Zoa Zane, and give no credit to the defendant for the amount paid to plaintiffs.*

Certainly, this instruction is erroneous and very apparently harmful and prejudicial to the defendant, and the court should have granted the motion for new trial.

In response to plaintiffs' request No. 10, and over the objection of the defendant, the court instructed the jury which appears on pages 450-451 of the Transcript of Record and is set out in Specification of Error No. 9, on the measure of damages to which plaintiffs were entitled. Again in this instruction the court told the jury that although plaintiffs sought to set aside a release on the grounds of fraud they could claim that such release was set aside only in part. In other words, it was not necessary that the release be set aside in its entirety, but the plaintiffs could accept the benefits of the part of the contract they desired to accept and reject the rest. The jury was

definitely told that it was not required to consider all injuries received by plaintiff, Zoa Zane, in the accident or to give consideration to the fact that defendant had paid the plaintiffs \$15,967.00, and were not required to give defendant any credit whatever for amounts paid plaintiffs before the institution of the suit.

We think this was error, and the motion for new trial should have been granted.

VII. The court erred in refusing, over the exception and objections of the defendant, instructions requested by the defendant which correctly stated the law applicable to the facts of this case, and the refusal of which prejudiced the defendant.

(Specifications of Error Nos. 10, 11, 12, 13, and 14.
Specification of Error No. 16.)

Defendant's requested instruction No. 2 was refused by the court (49, 462). In this request defendant asked the court to instruct the jury that the release in question contained a clause expressly stating that the same extended to all claims of every nature and kind, known or unknown, suspected or unsuspected and expressly waiving all rights under Section 1542 of the Civil Code of California, and to further instruct the jury that if the plaintiff, Zoa Zane, knew generally when she signed the release that its effect was to bar her right to sue for any injuries, although she did not know of or suspect such injuries, or if she attached her signature to said release carelessly or with indifference to her rights and without making any effort to determine the contents, then the release must be upheld unless the jury find from clear, convincing and satisfactory evidence that there was intentional fraud on the part of the de-

fendant. This instruction was particularly designed to offset the vices of the instructions given by the court at the request of the plaintiff set forth in Specifications of Error Nos. 6 and 7 in which the court submitted to the jury the questions of constructive fraud and mutual mistake without any consideration to the terms of the release or the intent of the plaintiffs in executing the same, and also in an attempt to cure the vices in the instruction given by the court at the request of the plaintiff set forth in Specification of Error No. 8 in which the court stated that the mere fact that the executed release was different in wording than the form originally submitted by the claim agent of the defendant justified the jury in disregarding the executed release, regardless of the circumstances under which it was executed.

The jury certainly should have been allowed to consider the intent of the parties when they executed a release expressly discharging the defendant from all claims of every nature and kind, known or unknown, suspected or unsuspected. They certainly should have been allowed to consider the circumstances under which the plaintiffs finally executed the release—did they use diligence or did they demonstrate complete disregard of the terms of the release? This is particularly true when it is admitted by the plaintiffs that the printed terms of the release originally submitted were exactly the same as the executed release, that is, it was generally in the same form. The only difference being in the wording contained in two blanks. This is particularly true when it is admitted by the plaintiffs that the terms of the release were discussed at the time it was signed. This is particularly true when it is ad-

mitted by the plaintiffs that in addition to said separate release, they executed releases in connection with the vouchers by which they were paid the compensation.

In its request No. 6 (53, 463) defendant requested the court to instruct the jury to the effect that although the jury may find that Zoa Zane's hip was fractured in the bus accident and it was falsely represented to her that there was no fracture, yet the falsity of such representation would not entitle the plaintiffs to recover unless they go further and prove by clear and convincing evidence that such falsity was known to the person making the same at the time he made it. The court, at the request of the defendant, did instruct the jury generally to the effect that fraud is never presumed and it must be established by clear, convincing and satisfactory evidence (452), but did not specifically instruct the jury on the burden required of the plaintiffs to prove false representations. In light of all other instructions given by the court, we think we were entitled to this instruction, and it was error to refuse it.

The court refused defendant's requested instruction No. 9 (55, 463) to the effect that although the relation of principal and agent did exist to some extent between the defendant and Dr. Blackman, but that said doctor was without authority to represent the defendant in the negotiation of a settlement of a claim, then any statements made by such doctor not for the purpose of influencing a settlement or release subsequently negotiated by an agent of the defendant company without knowledge on the agent's part of the statements made by the doctor, cannot avoid the release. This instruction was requested in view of the

fact that it was admitted that Dr. Blackman being upon the staff of the Southern Pacific Company, did treat employees of the defendant for certain illnesses, but he was not on the payroll of the defendant and had nothing to do with the treatment of injured passengers. We think we were entitled to the requested instruction to distinguish between his authority when treating employees under the Southern Pacific contract and when treating passengers, and it was error to refuse the same.

45 Am. Jur, page 688.

The court refused defendant's requested instruction No. 13 (57, 463) set out in Specification of Error No. 13 to the effect that even though the jury should find that there were false representations made to the plaintiffs by which they were induced to accept money from the defendant and execute a release, yet if the jury further found that the plaintiffs failed to rescind the release with reasonable diligence after discovery of the fraud and continue to retain and use the consideration paid them for the release for an unreasonable length of time after discovery of the fraud, then the plaintiffs ratified the release and cannot set the same aside.

In paragraph IV of this argument defendant contends and insists that the evidence is such that the defendant was entitled to an instructed verdict because it was conclusive that the plaintiffs had actual and definite knowledge of the alleged fraud in August, 1943, but gave no notice of rescission until more than fifteen months later when suit was filed, and in the interim retained more than \$5000.00 of defendant's money and expended the same for their own use. We strongly contend that the retention of

benefits of the release by the plaintiffs for the period of fifteen months without giving notice of rescission was an unreasonable length of time, which clearly prejudiced the defendant in the defense of this action in that evidence which would have been available has become unavailable.

If the court did not think that fifteen months was an unreasonable length of time as a matter of law for the plaintiffs to retain the benefits of the release without notice of rescission and therefore did not see fit to grant an instructed verdict on that ground, certainly the question of what is a reasonable or unreasonable length of time for the plaintiffs to retain these benefits and fail to give notice of rescission should have been submitted to the jury. The court's failure to do so was error and highly prejudicial to the defendant.

Defendant, in its requested instruction No. 14 (58, 464), which was refused by the court, requested the court to instruct the jury that if they found that the release should be set aside and avoided and that plaintiffs are entitled to recover, but that the plaintiffs are unable to make restitution to the defendant of the amount or amounts received by them on account of said release, then the defendant is entitled to receive credit for the amount paid to the plaintiffs—in other words, the jury in arriving at damages should first deduct all amounts received by plaintiffs from the defendant. In view of the damage instruction given by the court at the request of the plaintiffs set forth in Specification of Error No. 9 the defendant was entitled to this instruction, keeping in mind that this case was not submitted to the jury under Section 1542

of the Civil Code of California but was submitted on the theory of fraud, constructive or intentional. Fraud, if proven, vitiates the entire contract. It must be remembered that in the complaint it is admitted that the plaintiffs received at least \$14,500.00 on account of the release and by the proof it is shown that they received another \$1467.00 on account of hospital and medical expenses. Furthermore, it is expressly alleged in the complaint that the plaintiffs are making no restitution to the defendant on account of the fact that either they had expended the money before they discovered the fraud, or had been compelled to expend it thereafter to cure the plaintiff, Zoa Zane, of the injuries received by her unknown at the time of the release.

Regardless of such facts, and regardless of the pleadings, the court insisted throughout its instructions in submitting this case to the jury upon the theory that the contract was avoided only in part and not in its entirety and insisted upon instructing the jury that it should give no consideration to the amount of moneys paid to the plaintiffs by the defendant before the institution of the action.

This was indeed prejudicial to the defendant, and the motion for new trial should have been granted.

VIII. The court's instructions to the jury were conflicting and confusing and unduly accentuated plaintiffs' theory of the case.

(Specification of Error No. 15.)

(Specification of Error No. 16.)

In the charge to the jury there was undue and unnecessary repetition of instructions in favor of the plaintiff. The instructions are conflicting and confusing in that the

plaintiffs, in their complaint which was read to the jury at the beginning of the trial, sought to recover on three different grounds: (1) constructive fraud; (2) intentional fraud; (3) under Section 1542 of the Civil Code of California. The court in its instructions made no effort to define or explain these three different theories nor to distinguish between them. Although plaintiffs withdrew their requested instruction under said Section 1542, the court did not explain to the jury that they could not find for the plaintiffs on that theory.

IX. The court should have granted defendant's alternative motion for new trial.

(Specification of Error No. 16)

Defendant's alternative motion for a new trial (62-65) set forth all the grounds contained in Specifications of Error Nos. 1 to 15, inclusive. We therefore refer to paragraphs I to VIII, inclusive, of this Argument in support of our contention that at least a new trial should have been granted.

Respectfully submitted

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No. 11,194

United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,
vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

BRIEF OF APPELLEES

Upon Appeal from the District Court of the United States
for the District of Arizona

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United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

APPELLEES' BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona

I.

JURISDICTIONAL STATEMENT

The appellees concur in the statement of jurisdictional facts contained in appellant's opening brief.

II.

STATEMENT OF THE CASE

The statement as to the pleadings made in appellant's opening brief is correct, except the statement therein made that the third count of the complaint is substantially the same as the second count.

As is permitted by Rule 8(e)(2) of the Rules of Civil Procedure, the complaint sets forth three causes of action or statements of claim. The first statement of claim does not anticipate the defense of a release, and really was the only statement of claim that it was necessary to set forth. Like the other two statements of claim, it seeks recovery only for the injury to the femur or thigh bone of the plaintiff, Zoa H. Zane. The second and third statements of claim anticipate the defense of a release and set forth the reasons that it was ineffective to release the claim of the plaintiffs on account of said femur or thigh bone injury. The second statement of claim sets forth the lack of knowledge of such injury on the part of the plaintiffs at the time of the release and further sets forth the misrepresentations and fraud on the part of the agents of the defendant that caused the plaintiffs to believe that the only injury was the injury to the right foot and lower leg. The third statement of claim, although similar in most respects to the second statement of claim, differs from it in that it omits the allegations of actual or intentional fraud on the part of the defendant.

It is, we believe, important to bear in mind that by each of the statements of claim contained in the complaint of the plaintiffs, as well as by the instructions requested by them, recovery was sought only for the injury to the right femur or thigh bone of Zoa H. Zane, which, it was claimed, the plaintiffs were led by the agents of the defendants to believe she did not have, and that no recovery was anywhere sought for the injuries to the right foot or lower leg, or for any other injuries.

III.

STATEMENT OF FACTS

To the statement of facts contained in appellant's opening brief there should, we believe, be added the following:

When Zoa H. Zane arrived at the Coachella Valley Hospital at Indio she was in very profound shock and in a rather critical condition (361), and she was given blood plasma and morphine for pain (362). After the operation she was wheeled into a private room (90). Neither at the time she was taken to the hospital nor at any other time were any arrangements made by Mrs. Zane for her care or treatment at the hospital prior to the settlement, and she was not presented with any bills of the hospital or the doctor for hospital or doctor's charges (104, 105).

According to Mr. Earl F. Parks, Superintendent of the defendant, who was in the vicinity of the accident at the time it occurred, he had a talk with the deputy sheriff very shortly after the accident (353), and ambulances were dispatched to get the injured people into the hospitals (350). Shortly after the accident Mr. Parks was at the hospital to which Mrs. Zane was taken (344).

In the case of care and treatment of passengers injured in previous bus accidents the bills were paid by the Greyhound (398). Mrs. Zane was told by Dr. Blackman and by Mr. Cameron, the claim agent of the defendant, that she need not worry about the bills and that they would be taken care of by the Greyhound (92, 93, 95, 134).

Although during his first three or four visits to the hospital to see Mrs. Zane, which were about a week apart, the claim agent didn't ask her to name a figure, or name a figure himself, he was preparing his ground and told her about other cases he had settled and wanted her to make up her mind (96, 134).

While Mrs. Zane was in the hospital and in January, 1943, Dr. Blackman and Mr. Cameron had a conversation regarding the amount of the bill for hospitalization and doctor's services in which Mr. Cameron desired to make a settlement or agreement that the total bill would not exceed \$1,000.00. Dr. Blackman refused to do this and wrote Cameron to that effect (111, 112, 388, 389). Mr. Cameron told Mrs. Zane that Dr. Blackman had agreed to take care of her for \$1,000 and had changed his mind about it (112).

The hospital and doctor's charges up to the time of the settlement were paid by the defendant by a draft issued by its agent, the Western Adjusting Bureau, by Cameron, and drawn on the defendant for \$1467, payable to Jack Zane and Zoa Zane and Coachella Valley Hospital and Dr. W. H. Blackman, which was indorsed and given to the hospital (396). The Coachella Hospital on February 19, 1943, the date of the settlement, issued a receipt to the Pacific Greyhound Lines acknowledging receipt from the Pacific Greyhound Lines of \$1467 for hospitalization and doctor's care of Mrs. Zoa H. Zane from December 11, 1942, to February 19, 1943 (118, 119). After the settlement Mrs. Zane remained in the hospital from February 19 to March 8, 1943, and the charges of \$140.90 for this period were paid by her (396, 117, 119). Up to the time of the settlement Mrs. Zane occupied a

private room to which she was taken after the operation without any arrangement having been made by her for this (104, 124). After the settlement was made, upon her suggestion, she was moved into a ward and stayed there for the remainder of the time she was in the hospital (124).

Mr. Cameron, the claim agent, prior to the settlement, told the plaintiff, Zoa H. Zane, that Dr. Blackman was their doctor, that he had handled cases for them and was a good doctor, and that she could rely on anything Dr. Blackman told her (98). He further told her and her husband that the only injuries she had was the amputation of the right foot and lower leg and that she would be able to wear an artificial limb and be as good as new (106, 198), that her injury was more or less temporary and that within a few months she would be able to wear an artificial limb, and be up and doing the same things she did before (98). Dr. Blackman made similar representations to Mrs. Zane both in the presence of Mr. Cameron and alone (106, 107, 406, 383-385).

Cameron also told Mrs. Zane that the doctor had assured him that all that was the matter with her was the amputation of her foot and leg (109). At the time of the settlement Cameron said to the plaintiffs that it was a very good settlement for this loss (108, 198), and Dr. Blackman also so told Mrs. Zane (109).

The evidence is overwhelming that as a result of the accident there was a fracture of the neck of the right femur or thigh bone of Zoa H. Zane which was not known to her or her husband until long after the settlement, or until the last part of August, 1943 (113-115, 117, 124, 174, 190, 191, 209, 213). By reason of this injury Mrs.

Zane will be unable to wear an artificial limb, but will always have to use crutches (160, 161, 215).

The plaintiff's believed and relied upon the representations made to them by the claim agent and the doctor that the only injuries were those to the right foot and lower leg and that Zoa H. Zane could use an artificial limb, and they would not have signed the release had it not been for such belief and reliance (109, 201, 181, 182).

Some time prior to the conclusion of the settlement, the claim agent left with Mrs. Zane a form of release ready to be signed in which the amount of the settlement was stated to be \$14,500, and in which the injuries were described as the loss of the right foot and lower leg (102, 175, 176). When the claim agent came to conclude the settlement he took this release which had not been signed and said that he was going to the office. He soon returned and handed Mrs. Zane a release to sign which she was led to believe and believed was the release he had previously left with her and had taken with him (103, 104, 141, 175-177). The release that was handed to her for signing and that actually was signed stated the amount to be \$15,967 and the injuries to be personal injury and property damage (143).

The facts will be further elaborated in the argument.

IV.

ARGUMENT

The California Statute

In the second and third statements of claim contained in the complaint we set forth Section 1542 of the Civil

Code of California which provides that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him, must have materially affected his settlement with the debtor (12, 17, 18). This statute has been held by the California courts to apply to releases of claims for personal injuries resulting from an accident. *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334; *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 28 P. (2d) 433; *Backus v. Sessions et al.*, 110 P. (2d) 51, (Sup. Ct.).

We disagree with the statement of counsel for appellant that the release here involved is not a general release within the meaning of the statute. Certainly a release that provides for the release of a party from all claims and demands that a party now has or may hereafter have is a general release. The further provision that the release applies to all claims of every kind and nature, known or unknown, suspected or unsuspected, and waives the provisions of the section of the Code does not change the general character of the release, but, on the other hand, makes the release even more broad and general. A similar release was characterized as a general release by the California Supreme Court in *Backus v. Sessions*, 110 P. (2d) 51.

It is true, as stated in appellant's brief, that our requested instruction No. 7 (46-47) based partly upon the Section of the California Code was withdrawn. The reason for this was that this instruction was predicated on the right of the plaintiffs to recover, if, at the time of the execution of the release, the injury to the femur or thigh bone was not known, and although there were misrep-

resentations or fraud. In view of the seemingly conflicting state of the decisions of the California courts on the question, and inasmuch as the evidence clearly showed misrepresentations and fraud, we considered that there was no reason to rest our case on an instruction predicated on the absence of fraud or misrepresentation, when these elements had been established by the evidence. We did not, however, abandon the claim of the applicability of the statute to the release here involved, and we believed and still believe that the giving of the instruction would have been proper.

The only decision of the Supreme Court of California directly passing on the question is that of *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334.

The release in this case provided that the defendant was released from any and all actions, claims and demands for or by reason of any damage, loss or injury which theretofore might have been or which thereafter might be sustained in consequence of the accident, and by the release the releasor bound himself to indemnify and hold harmless the release from any loss he might be obliged to pay in the future in reference to the accident. As a result of the accident the party injured had an abscess of the spleen which was not known to any of the parties at the time of the execution of the release. There was no claim of any fraud or misrepresentation. The court cited and quoted Section 1542 of the Civil Code and held that, on account of the fact that the injury to the spleen was not known to the parties, recovery could be had for the results of this injury. It is to be noted that, while not using the words "whether known or unknown," the re-

lease in the *O'Meara* case was to the same effect as though those exact words had been used. As to this the court said:

"Accordingly, although the release may purport upon its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality, it does not do so. Section 1542, Civ. Code."

The case of *O'Meara v. Haiden*, supra, was followed in the later cases of *Gambrel v. Durensing*, 127 Cal. App. 593, 16 P. (2d) 284, and *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 28 P. 433, and was approved in the case of *Backus v. Sessions*, 110 P. (2d) 51 (Cal.).

In the *Gambrel* case, supra, while the release did not expressly state that it covered all known and unknown injuries, it did state that it released the release from all claims and demands arising out of the accident. The court held that, irrespective of the question of fraud, as there was a mistake of the parties as to the injury upon which the action was predicated, recovery could be had for such injury.

In the case of *Hudgins v. Standard Oil Co.*, supra, the release contained the same wording as the release in the case at bar and provided that it extended to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and that all rights under Section 154 of the Civil Code of California were expressly waived. The court held that the mutual mistake of the parties as to the injuries would avoid the release.

Although the case of *Backus v. Sessions*, 17 Cal. (2d) 380, 110 P. (2d) 51, decided by the Supreme Court of California, involved other matters, such as the competency of the releasor at the time of the execution of the release,

the court expressly approved and confirmed its previous decision in the case of *O'Meara v. Haiden*, supra, and treated the language of the release in the case as covering all known and unknown injuries. In doing so, the court said:

"O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, is controlling here. There the action was for wrongful death of a minor occurring seven months after the accident, caused by an injury to the spleen. The defense was a release of all known and unknown damages given prior to the minor's death. * * * This court held the release did not cover the damages for the death resulting from the injury to the spleen, stating at page 360 of 204 Cal. at page 337 of 268 P., 60 A. L. R. 1381:

"It appears, therefore, beyond question, that at the date of the release the injury which was the cause of the boy's death was not known to either party. It was not in the minds of the parties at the time of settlement which resulted in the execution of this written release. Accordingly, although the release may purport on its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality, it does not do so. Section 1542, Civ. Code.' "

The case of *Berry v. Struble*, 20 Cal. App. (2d) 299, 66 P. (2d) 746, cited by counsel for appellant, did not involve an unknown injury, but involved unanticipated consequences of a known injury. It further did not appear that there was a mutual mistake. The court, although it did not place its decision on that ground, stated that there was evidence tending to show that the plaintiff was not suffering from an unknown injury when the release was

executed. The facts of the case are distinguishable from the facts in the case of *O'Meara v. Haiden*, supra, and from the facts in the case at bar, in that, in the case of *Berry v. Struble*, supra, there was not an unknown injury, but only unanticipated results of a known injury, and, further, in that the facts did not show a mutual mistake. The court stated that in the case of *O'Meara v. Haiden*, supra, the release did not contain a provision that it should apply to all unknown injuries, but this was not the case, and is contrary to the statement of the California Supreme Court in the case of *Backus v. Sessions*, supra, above quoted, which treats the provision of the release in the *O'Meara* case as applying to all known and unknown injuries.

In the case of *Berry v. Struble*, supra, as well as all the above cited California cases, with the exception of the case of *Backus v. Sessions*, supra, there was no element or claim of misrepresentation or fraud, either actual or constructive.

Counsel also, in this connection, cited in their brief the case of *Jordan v. Guerra*, (Cal. App.) 136 P. (2d) 367. Not only did that case not support the rule claimed by the appellant, but also the case was overruled by the California Supreme Court in the case of *Jordan v. Guerra*, 144 P. (2d) 349.

II.

Even if there were no misrepresentations or fraud on the part of the defendant, the plaintiffs were entitled to recover on the ground of mutual mistake.

As we have shown, in the case of *Berry v. Struble*, 20 Cal. App. (2d) 299, 66 P. (2d) 746, being one of the

cases upon which appellant has relied, not only was there no claim of misrepresentation, but also there was not even any claim of mutual mistake. In that case, also, there was only a single injury to the leg that turned out to be more serious than the plaintiff considered it to be at the time of the release, and there was not an injury to another part of the body that was unknown.

In the case of *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, the facts showed a mutual mistake and also that there was a distinct injury that was not known to the parties and which neither of them had in mind when the settlement was made, and it was held that the plaintiff was entitled to recover.

In accord with this decision, and in accord with the decisions of many other courts, this court held in the case of *Great Northern Ry. Co. v. Reid*, 245 F. 86 (9th Cir.), that, no matter, how broad and inclusive the terms of a release may be, it will not be held to include a particular injury that was serious and was then unknown to both parties. In so holding, the court said:

“The release itself is as broad as it could be made, acquitting the company of all liability arising on account of the injuries received by appellee, whether then appearing or growing out of the same development in the future, or arising or to arise out of any and all present injuries sustained at any time or place while in the employ of the Railway company prior to the date of the release. In such a release, however, the general language will be held not to include a particular injury, then unknown to both parties, of a character so serious as to indicate that, if it had been known, the release would not have been

signed. This was the conclusion reached in Lumley v. Wabash R. Co. (C.C.A. Sixth Circuit) 76 Fed. 66, 22 C.C.A. 60. See also Tatman v. Philadelphia B. & Wr. Co. (Del CH) 85 Atl. 716."

Many other cases so holding that a mutual mistake is sufficient to prevent a release from covering unknown and distinct injuries are found in the annotations in L.R.A. 1916B, 776, 48 A.L.R. 1471 et seq. and 117 A.L.R. 1030 et seq.

We believe that, irrespective of statute, this general law is the law both in California and in Arizona. We have here, however, a much stronger case than one where there was only a mutual mistake since, in the case at bar, the mistake of the plaintiffs as to the injuries was induced by misrepresentations of the defendant.

III.

Regardless of the provisions of the release the plaintiffs were entitled to recover for the injury to the femur of Zoa H. Zane by reason of the representations that her only injury was the injury to the right foot and lower leg that necessitated the amputation.

Misrepresentations and fraud inducing the execution of the release were clearly proved by the evidence. In view of this, we submit that, under the authorities, the plaintiffs unquestionably had the right of recovery for the unknown injury which it was represented to them Mrs. Zane did not have.

The evidence is clear and beyond question that it was stated and represented to the plaintiffs by the claim agent and the doctor that the only injury was the injury

to the right foot and lower leg, which necessitated the amputation and that the plaintiff would be able to wear and use an artificial limb and to get around as well as she could before the accident.

The evidence is also clear and beyond question that these representations were believed and relied upon by the plaintiffs and that they were thereby induced to make the settlement and to execute the release, and that they would not have made the settlement or executed the release had it not been for such belief and reliance. The representations very clearly were employed and used in the settlement negotiations and were instrumental in causing the settlement to be made.

There is no basis whatsoever for the statement on page 38 of appellant's brief that it is apparent that, even if the plaintiffs knew that Mrs. Zane had a fractured hip, they still would have made the settlement. The same applies to the statement on the following page that the evidence is very persuasive that the fracture of the femur discovered in August, 1943, did not exist while Mrs. Zane was in the Indio Hospital. The evidence is overwhelmingly to the contrary (113-115, 117, 124, 174, 190, 191, 209, 213). It is clear and beyond question, as is shown by the foregoing references to the Transcript, that the representations so made to the plaintiffs were false and untrue and that, in the accident, she sustained an injury to the right femur resulting in a fracture and non-union, which will prevent her from using an artificial limb and will cause her to be a hopeless cripple and to be unable to walk without crutches during the remainder of her life.

It is true that, except in the matter of the substitution of releases, which we later shall discuss, we did not request an instruction based on actual or intentional fraud. Counsel for the defendant, however, did ask for such instruction setting forth all the various elements of intentional fraud (51) and this instruction was given (451, 452). We believe that, under the California Code and under the general law, actual or intentional fraud in connection with the making of the misrepresentations can very well be inferred from the evidence, as we later shall show.

In any event, under the authorities, whether the misrepresentations were innocently or intentionally made is not material. If they were innocently and unintentionally made, this constituted constructive fraud, which has the same effect and results as actual or intentional fraud. In Vol. 8, Words and Phrases, page 119, numerous cases are collected defining and stating the rule as to constructive fraud, from which we quote the following:

“‘Constructive fraud’ is a term evolved to designate what is in the essence the receipt and retention of unwarranted benefits through misrepresentation. Herwig v. Harris, 175 A. 169, 172, 117 N. J. Eq. 146.

“‘Constructive fraud’ is a term applied to a great variety of transactions which equity regards as wrongful, and to which it attributes the same effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of actual fraud.” Douglas v. Ogle, 85 So. 243, 244, 80 Fla. 42.

“‘Constructive fraud’ exists where conduct, although not actual fraud, ought to be so treated, that

is, in which such conduct is constructive or quasi-fraud having all the consequences and legal effect of fraud." Younglove v. Hacker, 59 P. (2d) 451, 15 Cal. App. (2d) 211.

Although in some of the cases there is rather loose language in applying the terms "mutual mistake" and "constructive fraud" it obviously is not the case, as stated by counsel for appellant, that constructive fraud is nothing more than mutual mistake. In a case of this kind, in addition to a mistake of both parties, it involves a misrepresentation made by one of the parties that induced and caused the other party to be misled as to the injuries sustained. Such misrepresentations are held by the authorities to constitute constructive fraud and to have the same effect and results, whether intentional or not. This case is not a case simply of mutual mistake, but it goes further than that. We have here a case where the mistaken belief of the plaintiffs that Mrs. Zane had no other injury except that to her foot and lower leg was induced and caused by the misrepresentations of the defendant. It is our position that in cases where there have been misrepresentations as to the injuries and a release is executed under the erroneous belief induced by such misrepresentations that only a certain injury existed, while as a matter of fact there was another serious injury, such release cannot be claimed or held to cover such other injury which the releasor had been led by the releasee to believe did not exist. As to such injury, the release is ineffective. In such a case it makes no difference how broad or inclusive the language of the release may be or what it may contain.

Counsel for appellant apparently make the claim that if a release is executed that by its express wording covers known and unknown injuries, the claimant is barred and estopped from recovering for the unknown injuries even though statements and representations were innocently made to the claimant that there were no other injuries and these statements and representations were absolutely false. Although counsel state that this is the rule by the overwhelming authority, they have not cited a single case that supports it. We shall discuss the four cases cited on page 34 of the brief as representative of this claimed "overwhelming authority."

The first case is that of *Hanson v. Northern States Power Co.*, 198 Minn. 24, 268 N.W. 642. In this case there was no element whatsoever of constructive fraud. No statements or representations were made to the claimant as to her injuries. There was not even a mutual mistake. The court said that the mistake, if any, was on the part of the plaintiff alone. The defendant had not had the plaintiff examined or contacted her or had any discussion with her regarding her injuries. In this connection the court said:

"They did not have her examined, nor did they contact her for the purpose of discussing and determining whether she had suffered injuries or the extent or nature thereof. * * * They were obviously interested in getting from her a release as to all claims she might have before settling with her husband. While it may be that the plaintiff was mistaken as to her injuries at the time of signing the release, the mistake, if any, was not shared by the defendants, and therefore, as a matter of law there was

no mutual mistake. * * * As the unilateral mistake under which plaintiff was laboring was in no way due to the fraud or other misconduct of the defendants or their agents, that fact likewise is no ground for vitiating the release."

It will be seen that in this case there were no untrue statements or representations and there was not even a mutual mistake. The court, however, had the following to say of a situation involving a mutual mistake.

"We have no quarrel with plaintiff's contention that where the parties, with their attention directed to known injuries, contracted with reference thereto in ignorance of other and more serious injuries, both parties believing the known injuries are the only ones sustained, there is mutual mistake and a release executed under such mistake is no bar to an action for the unknown injuries. Richardson v. Chi., Milwaukee & St. P. Ry. Co., 157 Minn. 474, 196 N.W. 643, Mix v. Downing, 176 Minn. 156, 222 N.W. 913, Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001. It is also true that this court has indicated that even though a release expressly includes unknown injuries, such expression is not conclusive, and mutual mistake may be shown for the purpose of vitiating the agreement. Nygood v. Minneapolis St. Ry Co., 147 Minn. 109, 179 N. W. 642."

Under this decision, there can be no question as to what the holding of the Minnesota court would be in a case where there not only was mutual mistake, but where also the mistake on the part of the plaintiff was caused by untrue statements and representations of the defendant.

The next case cited by counsel, being the case of *Moses v. Carver*, 298 N. Y. Supp. 378, 164 Misc. 204, likewise not only does not support appellant's claim but directly sustains our position. The release in this case purported to discharge the defendant from liability for all claims, losses or injuries, "whether developed or undeveloped, resulting or to result from the accident." It also set forth that the injuries had been represented to be permanent and progressive and that the releasors relied wholly on their own judgment, belief and knowledge as to the injuries. The release, as was stated by the court, was designed to cover not only future effects or developments of the injury but unknown injuries existing at the time which were not taken into consideration.

Actual fraud in procuring the release was not claimed. The court held that the release could not be set aside or cancelled because of mutual mistake but, directly opposed to appellant's claim that mutual mistake and constructive fraud are the same thing and that a release is not effected by representations innocently made, the court held:

"Proof of actual fraud is not necessary to rescind a contract which has been consummated through misrepresentation of material facts not amounting to fraud. *Bloomquist v. Farston*, 222 N. Y. 375, 118 N. E. 855.

"Equity will, in a proper case avoid and set aside a transaction induced or produced through material misrepresentations and false statements, although the statements and representations were honestly made, with no intent to deceive. *Leary v. Geller*, 224 N. Y. 56, 120 N. E. 31; *Matter of Smith*, 243 App. Div. 348, 353, 276 N. Y. S. 646. * * *.

"It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, and this rule applies to actions at law based upon recission, as well as to actions for rescission in equity. *Seneca Wire & Mfg. Co. v. B. Leach & Co.*, 247 N. Y. 1, 159 N. E. 700."

In this New York case, cited by counsel for appellant, the plaintiff was held to be entitled to recover although the release expressly purported to cover all unknown injuries and although there was no actual fraud, and it is strongly and directly in our favor.

The third of the four cases cited by counsel for appellant as representative of the "overwhelming authority" claimed by them is the case of *Hoffman v. Eastern Wisconsin R. & Light Co.*, 134 Wis. 603, 115 N. W. 383. The release involved acknowledged "full payment and satisfaction of all claims which I now have, or may hereafter have" by reason of the injuries received in the accident, "said injuries then and there received, as claimed by me, being right limb, contusion, head struck, shook up badly, and further, by reason of said accident and collision, I was otherwise bruised and injured."

The only issue submitted to the court was one of construction as to whether or not the release *by its words* covered a condition of the ovary that later developed. The court held that the language of the release was sufficiently broad to cover this condition. There was no question in the case as to fraud, misrepresentations, or mutual mistake. The court said:

"There is no question of fraud, and no suggestion of mutual mistake as to the harm that might develop from the injuries plaintiff had received."

It is obvious that this case has no bearing whatsoever on the matters here involved.

The same is true of the case of *Quebe v. Gulf C. & S. F. R. Co.*, 98 Texas 6, 81 S. W. 20, which involved a release that recited injuries to the throat and breast by falling on a peg and further stated that, for the purpose of fully ending and determining any claim for damages that the releasor might have, he released the company from any and all manner of actions, suits, etc., whatsoever that he ever had or now had.

All issues in the case were submitted to the jury, who returned a general verdict for the defendant. The trial court left to the jury the question whether the parties intended by the release to include therein an injury to plaintiff's eyes, and on appeal the plaintiff contended the court should not have thus submitted to the jury the question as to the legal effect of the instrument but should have instructed as a matter of law that it did not embrace the injuries to the eyes for which damages were claimed. As to the issue before it, the court said:

"This raises the question as to the construction of the instrument simply, and leaves out of view all questions as to want of consideration, mistake and fraud."

The court held that, construed by its language alone, the release was sufficiently broad to embrace all damages arising from the accident specified in the release, to wit, the falling on a peg.

Since the question of mistake was submitted to the jury and the plaintiff had not requested any submission as to fraud, these matters were held to have been concluded by the verdict. As to a statement made by the surgeon of the defendant that the injuries to the throat and breast were trifling the court, by way of dictum, said that this was only his medical opinion. This statement made in 1904 has been criticized in later cases, and certainly there can be no claim that the representations made in the case at bar were not statements of fact. Further, as is stated in the case of *Missouri, K. & T. Ry. Co. of Texas v. Haven*, 200 S. W. 1152 (Court of Civil Appeals of Texas) in referring to the remark of the court in the *Quebe* case, supra, the statement of the surgeon to Quebe was true in fact as a condition of the throat and breast, to which it applied.

The case of *Jacobson v. Chi., M. & St. P. Ry. Co.*, 132 Minn. 181, 156 N. W. 251, also cited in appellant's brief, strongly supports the rule for which we stand. In that case, the court very clearly based its decision on misrepresentation and fraud. This runs through the decision and especially appears from the following language:

“It is fraud for one to make an unqualified representation not knowing whether it is true or false, and that an unqualified statement amounts to an affirmation as of one's own knowledge.”

In holding that it makes no difference whether the statements were intentional or were known to be false by the party making them, the court further said:

“A party cannot falsely assert a fact to be true and induce another to rely thereon to his prejudice,

and thereafter hide behind the claim that he did not know it was false at the time he made it."

The rule, supported as we have shown by the cases cited in appellant's brief, that, in a case where there have been untrue representations as to the injuries even though not known to be false by the party making them, which induced the execution of the release, and there was another injury that was falsely represented not to exist, the release, though it may in general terms embrace all unknown and unsuspected injuries, does not in fact or law cover such injuries or bar the right to recover therefor, is sustained by the authorities. This rule is supported by the case of *Atchison etc. Ry. Co. v. Peterson*, 34 Ariz. 292, 271 Pac. 406, which, while cited by us in the lower court, was by no means the only case upon which we there relied, as counsel would make it appear.

In this *Peterson* case the facts in favor of the plaintiff were not nearly so strong as the facts in favor of the plaintiffs in the case at bar in that the representations in the *Peterson* case were only as to the effects and duration of a known injury, while in the case at bar the representations were that there was no other injury when another very serious injury existed. In the *Peterson* case the lower court instructed the jury that it was not necessary that the representations were known to be false or that there was any wrongful intent on the part of the party who made them to deceive or defraud the plaintiff, and this instruction was upheld by the Arizona Supreme Court. In so doing, the court cited many authorities and said:

"It is true that, when actual fraud must be shown, as in the old common law action of deceit, no recovery

can be had unless intentional deception appears, and many authorities hold to the strict application of this rule whenever relief is sought upon the ground of fraudulent representations; but, since an unintentional fraud often results in as great injury to the person defrauded as an intentional one, the courts have qualified the rule in such a way as to permit the granting of relief in actions whose purpose is to restore to a party that with which he has parted, and which are founded upon a contract induced and brought about by representations false in fact, though made in good faith."

Counsel for appellant claim that the *Peterson* case is distinguishable from the case at bar as the terms of the release were not given any consideration nor recited nor mentioned in the decision. In the second paragraph of the opinion the court states that Peterson signed a release document in which, for a consideration of \$1,000, he released and discharged the railway company from all claims he then had or might thereafter have as a result of the injuries sustained by him. This release certainly was just as inclusive as the release in the case at bar, and it included and covered in words the claim upon which Peterson later brought the suit. However, by reason of the false representations it was held not to be a bar or defense to the suit.

The *Peterson* case, supra, was cited with approval in the case of *Matthews v. Atchison, T. & S. F. Ry. Co.*, 54 C. A. (2d) 549, 129 P. (2d) 435. In this case the release purported to release the defendant from any and all claims which he had or thereafter might have on account of the injuries in question, including any injuries that

might thereafter develop. This cannot be said to be any different from the release relied upon by the defendant in the case at bar. The court held that, if false statements were made to the plaintiff as to his injuries, it made no difference whether the party making the statements believed them to be true or not, and that the release in either event was not a bar to the action. It was further held that it was immaterial whether by its terms the release comprehended the damages sued for, and that the case of *Berry v. Struble*, 20 Cal. App. 299, 66 P. (2d) 746, on which the defendant relied, was not in point.

In the case of *F. Kieck Mfg. Co. v. James*, 164 Ark. 137, 261 S. W. 24, the release executed by the plaintiff recited that he released the defendant from all claims, demands, damages, etc., from any matter or thing whatsoever prior to the date thereof, and all other loss or damage resulting or to result from the accident. The release further stated that the releasor relied wholly upon his own judgment, and knowledge of the nature and extent of his injuries, disability and damage and that no representations or statements about them had induced him to make the settlement.

There was no attempt to prove any intentional fraud, and it was admitted that the untrue representation was made in good faith in the expression of an honest opinion that the injury was not permanent.

The court held that, if misrepresentations were made regarding the injury, whether they were intentionally or innocently made, the release was not a bar to the action and the plaintiff could recover. We quote the following

from Vol. 53, C. J., pp. 1216, 1217, par. 33, under the heading "Innocent Misrepresentation":

"It is generally held that an innocent misrepresentation by the releasee or his agent of a material fact, intended to be acted upon by the releasor, and relied upon by him is effective to avoid a release induced thereby; thus a misrepresentation to the releasor by the physician employed by the releasee as to the releasor's injuries or physical condition, made in good faith and with no intention to deceive, and relied on by the releasor will be given such effect, particularly where the physician failed to exercise due care in ascertaining the facts on which he based his opinion. Such a misrepresentation has been held to constitute constructive fraud, or fraud in law."

Numerous cases supporting the foregoing are cited in the notes thereto.

Under both reason and the authorities, no matter how broad and inclusive the language of the release may be, it should not and cannot be held to cover unknown injuries, in a case where the releasor was led to believe that there were no unknown injuries and by reason thereof was induced to sign the release.

IV.

There was actual and intentional fraud on the part of the defendant.

That there was actual and intentional fraud in the matter of the substitution of releases clearly appears from the evidence, as we shall show. We also believe that, under the evidence, actual and intentional fraud in the making of the representations can very well be inferred. In this

connection we desire first to comment on several statements made in appellant's brief.

On page 36 it is stated that for the first three weeks Mrs. Zane was in the hospital, Cameron never discussed the matter of settlement and that he was merely solicitous of her welfare. Mrs. Zane's testimony was that, during the first three or four visits, although Cameron did not urge her to accept any settlement, he was preparing his ground, and wanted her to make an offer, that he told her of the other cases he had settled, and that he had settled the two death cases for \$10,000 each (96, 135). She told him that she would not want to take \$10,000. The evidence clearly shows that during the first several weeks the claim agent was laying the ground for the settlement, and that, while naturally solicitous, he was gaining her confidence. Having ascertained that she would not accept as low an amount as \$10,000, he made his offer a little higher than that and offered her \$12,000 (137).

Counsel for appellant on page 36 of their brief also state that Cameron would not deal with Mrs. Zane without the approval of her husband, that at all times he urged her to confer with him, and that he would not accept a release except one executed by the husband in his, Cameron's, presence. There was no evidence whatsoever upon which to base any of these statements.

It is also stated that there was no effort to isolate Mrs. Zane or to prevent her from consulting persons whom she desired to consult. No effort to isolate Mrs. Zane was necessary, since her condition resulting from the accident caused her to be isolated and to remain in the hospital under the care of and in contact only with the agents of

the defendant and without independent medical or legal advice. As to consulting persons, the evidence was that, when Mrs. Zane discussed the matter of having an attorney, the claim agent told her that probably she could get a better settlement by dealing with him personally (108). When the suggestion was made to the claim agent that Mrs. Zane be taken to Los Angeles for care and treatment, he advised that this was not necessary and that she be left with Dr. Blackman who was as good a doctor as there was in Los Angeles (196, 197).

On page 37 of their brief counsel for appellant state that, when Cameron accepted plaintiffs' offer, he went to Indio and, as the husband was not present, he left a form of release to be studied and discussed by them. There is no such evidence. The evidence is that Cameron left with Mrs. Zane a form of release all ready to be signed and that his instructions to her were that, in case her husband came in, for them to go before a Notary Public and sign the release in his presence (103). When Cameron returned to Indio he asked whether the release had been signed and was told that it had not (145).

It is also stated on page 37 of appellant's brief that Cameron made no effort to hurry the plaintiffs. The evidence is that when he returned on February 19th he was in a hurry to get the case closed and that he said he was apt to get in trouble with the head office. At that time he was quite disagreeable and told Mrs. Zane, who was crying, that the doctor said she was to be released from the hospital and there wasn't any reason for her not to sign the release (103, 198, 199, 242, 243).

Dr. Lytton-Smith did not testify, as stated on page

39 of appellant's brief, that, had he administered treatment to Mrs. Zane as described by Dr. Blackman, he would have reached the conclusion that there was no fracture of the hip. Dr. Lytton-Smith, in answer to a question of counsel for the defendant, only said that he would not take X-rays unless he thought they were necessary or unless his physical examination indicated an injury that required an X-ray. Dr. Lytton-Smith did, however, testify that if pain in the upper portion of the leg had been reported to him, he would have X-rayed the upper portion of her femur, and that he also would have taken an X-ray if it had been reported to him that the right portion of Mrs. Zane's leg above the knee was two inches shorter than the left one (230-233). His testimony also very clearly shows that the hip was fractured as a result of the bus accident (213), and that this fracture was easily discernible (222).

Mrs. Zane was in the hospital almost three months and she was visited by Cameron, the claim agent, about once a week for the first several weeks and later so often that she could not enumerate the times (135, 139). The evidence shows that Mrs. Zane almost continuously suffered pain in her upper leg, hip and knee and that she complained of this to the doctor (107, 131, 321). No X-rays of the upper leg were taken (107). When measurements were made for an artificial limb it was found that the upper portion of the right leg was about two inches shorter than the upper portion of the left leg and, upon this being reported to the doctor, he still told Mrs. Zane that there was nothing the matter with her hip, that she was just lazy, and that, if she would exercise a little, she would get where she could use the artificial leg (113-115).

The claim agent told Mrs. Zane that, any time that Dr. Blackman said that she could settle and that she was all right, she could take his word for it (98). Prior to the settlement Dr. Blackman and Cameron were both in Mrs. Zane's room and told her of the people they knew that had artificial limbs, and that as soon as she was up and had her strength back she would be able to wear an artificial limb and be as good as new (106). Dr. Blackman brought Mrs. Zane a pamphlet showing a party who had an artificial limb high-jumping and said that she would be able to do the same as soon as she was up and could wear an artificial limb (106). In his deposition taken by the defendant and introduced in evidence by it, Dr. Blackman without objection on the part of the defendant testified to the same effect and that he showed Mrs. Zane a folder advertising a type of artificial limb and showing a man sprinting, or dancing, and doing various stunts with it (401). He further testified on examination by counsel for the defendant that he assured Mrs. Zane that there was no evidence of any other serious injuries at all other than the foot and leg that she lost (385). From his testimony introduced by the defendant it is apparent that the doctor led Mrs. Zane to believe that she would be able to use an artificial limb and to become adept in its use (384, 385, 401).

By Section 1572 of the California Civil Code actual fraud is stated to consist, among other things, of the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, or of any other act fitted to deceive. The statements and representations made

to the plaintiffs are very clearly within this definition in that they were made positively and unqualifiedly and without sufficient basis therefor, and were fitted to deceive, and also in view of the situation of the parties and the confidential relationship existing between them. *Viallet v. Consolidated R. & Power Company*, 30 Utah 260, 84 P. 496.

In the matter of the substitution of the release, the evidence is very strong and undisputed that actual and intentional fraud was practiced upon the plaintiffs, as a result of which the release signed by them was not the release they understood and believed they were signing.

The evidence is that the claim agent, a week or so before any release was signed, left with Mrs. Zane a release all made out and ready to be signed in which the consideration was stated to be \$14,500, and in which the injuries resulting from the accident were stated to be the loss of the right foot and lower leg. This release was left by the claim agent with Mrs. Zane with instructions that, in case her husband came back while he was not there, they should sign it before a notary (100-103, 140-141, 175-180, 239). The evidence further is that when the claim agent returned to the hospital on February 19, 1943, a week or so later, this release had not been signed, since Mr. Zane had not been there in the meantime and only arrived that day, and that the claim agent took the release that he had theretofore left with Mrs. Zane and said he was going to the office (103, 141). When he returned to the room, he handed the plaintiffs a release to sign which they naturally believed was the release that previously had been left with Mrs. Zane, and were

so led to believe (103, 141). The release that was so signed under this misapprehension stated the consideration to be \$15,967, and the injuries that resulted from the accident to be personal injury and property damage.

The evidence also is that when the claim agent returned on February 19 he was in a hurry to get the deal closed, and said that he had spent so much time on the case, and that there was no reason for not signing the release (103, 198, 199).

That the release that was signed was not the release that had been left with Mrs. Zane and that the plaintiffs were led to believe and did believe they were signing, is clear. The hospital and doctor's charges were on a day-to-day basis (145) and they could not possibly have been known or computed at the time the release was left with Mrs. Zane, as it was not then known when the release would be signed. Therefore, the release that was signed was clearly a new release in which the amount and the statement of injuries was inserted by the claim agent that day and, unknown to the plaintiffs, this release was substituted by the claim agent, as very easily could have been done. The evidence as to this matter, contrary to the claim of appellant's counsel, is clear, convincing and satisfactory. The fact that the release left with Mrs. Zane did not mention the injury to the left ankle is easily explainable as this injury was comparatively unimportant and was only temporary, having healed within two weeks after the accident (179, 180).

The defendant, by having Mrs. Zane fill out in the form of release the amount and the description of the injuries as they were written and contained in the release that

had been left with her by the claim agent, and by introducing in evidence this form so filled in, made the evidence of the substitution even more convincing and adopted the same (176-178).

The substituted release, by stating the amount to be \$15,967 made it appear that the plaintiffs in addition to the \$14,500 were being paid the amount of the hospital and doctor's bill and that they were paying this bill, while the true situation was that the defendant paid the hospital and doctor's bill, as Mrs. Zane had been told it would do and as the separate check and the receipt of the hospital show. The fact that Mrs. Zane included this in her wire offering settlement is fully explained by the dispute she heard between the claim agent and doctor as to the amount of the bill as, in view of this, naturally she did not want any question to arise concerning it.

A still more important difference in the two releases is that the release left with Mrs. Zane and that the plaintiffs thought they were signing particularly and specifically described the injuries resulting from the accident to be the loss of the right foot and lower leg, while the release that was signed stated the accident to have resulted in personal injury and property damage. This difference certainly is most material, and the fact that the written specific description was followed by the general printed clause concerning all injuries known or unknown, etc., does not make it any less so.

The recital of the injuries resulting from the accident in the releases was written in. In the case of the release left with Mrs. Zane this was stated in writing to have been the loss of the right foot and lower leg. The clauses following were printed.

The authorities hold that when, in a release, there is a particular recital that is followed by general words, the general words are limited and restricted by the particular recital, and that this is especially true where the general words are printed and the particular recitals are written in.

53 Corpus Juris, pages 1241, 1242, par. 61;
45 Am. Jur., pages 693, 694, par. 29;
Texas P. & R. Co. v. Dashiell, 198 U. S. 521, 49 L. Ed. 1150; 25 S. Ct. Rep. 737;
Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L.R.A. 581 (C.C.A. 8th Cir.);
Lumley v. Wabash R. Co., 76 Fed. 66 (C.C.A. 6th).

There can be no question that the release that the plaintiffs, by reason of the deception and fraud practiced upon them, were caused to believe they were signing would not, under any circumstances, be any bar to the recovery for injuries not mentioned in the release and that later were discovered.

It further is to be noted that in this case, like the case of *Backus v. Sessions*, 17 Cal. (2d) 380, 110 P. (2d) 51, which we hereinbefore have cited, in addition to the separate release, there was a release in connection with the draft which did not contain the clauses of the separate release. Although the *Backus v. Sessions* case did not involve a substitution of releases, under the holding of the court in that case and the principles there laid down, the plaintiffs in the case at bar, by reason of the substitution, very clearly can recover for the unknown injury.

This is true under any theory that may be taken, and it further is fully sustained by the case of *Jordan v. Guerra*, 23 Cal. (2d) 469, 144 P. (2d) 349.

V.

The evidence was competent and sufficient that false representations were made by agents of the defendant upon which plaintiffs were entitled to rely, and there was no hearsay testimony on behalf of plaintiffs that was harmful or prejudicial to the defendant.

We shall here deal with paragraphs III and V of appellant's argument.

The case of *U. S. Smelting, etc., Co. v. Wallapai Mining Development Co.*, 27 Ariz. 126, 230 P. 1109, cited by appellant, involved a written contract signed by an individual, who, it was claimed by the plaintiff, was the agent of two corporations in the making of the contract, one of which was not then in existence. As to the other company, the only evidence was that he was general manager of the company, and some letter-heads of the company. The court, of course, held the evidence of agency insufficient. In the opinion, the court stated the general rule that the agency must be proved by other evidence before the agent's acts and declarations can be shown against the principal. There is, however, nothing whatsoever in the opinion of the court opposed to the rule laid down by the authorities that, when there is other proof of agency, the acts and statements of the agent become admissible in connection with, and in corroboration of, such other evidence, where they are made at the time and as part of the transaction in question, and that the order of proof in which they may be admitted is in the discretion of the court.

2 C. J., pages 939, 940, pars. 694, 695;

3 C. J. S., pages 280, 281, par. 322;

First Unitarian Society of Chicago v. Faulkner,
91 U. S. 413; 23 L. Ed. 283;
Hope Mining Co. v. Burger, 37 Cal. App. 239,
174 P. 932;
Paff v. Ottinger, 23 Cal. App. 439, 163 P. 230;
Dooley v. West American Commercial Ins. Co., 133
Cal. App. 58, 23 P. (2d) 766.

In the other Arizona case cited in appellant's brief, *Bristol v. Moser*, 55 Ariz. 185, 99 P. (2d) 706, the court very clearly recognizes and states the rule that an agency is not required to be proved by direct testimony, but is susceptible of proof as is any other fact, and may be established from the circumstances, such as the relation of the parties to each other and to the subject matter, and their acts and conduct. *Little v. Brown*, 40 Ariz. 206, 11 P. (2d) 610. The liberal rule adopted by the courts as to the admissibility of evidence in proof of agency is stated in Vol. 3, C. J. S., page 273, par. 322, as follows:

“Even though it is not full and satisfactory, or is only remotely relevant, any competent evidence which has a tendency to prove or disprove agency is admissible for that purpose, regardless of whether it is oral or written, or is direct, indirect, or circumstantial.”

On page 688 of 45 Am. Jur., cited by appellant, is the following:

“Attending physicians or surgeons of a party responsible for an injury may, it seems, be regarded as authorized to advise the injured party as to the nature or extent of his injuries, so that the releasee will be bound thereby.”

That all the circumstances in a case of this kind can be brought out to show the relationship of the parties is shown by the case of *Wilson v. San Francisco-Oakland Terminal Rys.*, 48 Cal. App. 343, 191 P. 975, and also in the later case of *Jordan v. Guerra*, 23 Cal. (2d) 469, 144 P. (2d) 349.

In the *Wilson* case, supra, the court said:

"If the release relied upon by the defendant corporation to defeat plaintiff's action was the product of such methods, plaintiff should have been allowed to prove it. Whether or not there was any existing relation between Norwood and Mills was one of the questions for the jury to decide after hearing all of the circumstances surrounding the transaction. * * * Norwood was obviously not acting in behalf of plaintiff. The jury, then, had a right to know what his interest was, and the extent of it, and the reason for his asserted false statements to plaintiff, if he did in fact make any. Plaintiff should have been permitted to present all these circumstances to the jury in order to prove, if she could, that the unusual activities of Norwood could be accounted for on no other hypothesis than that he was the agent of the defendant corporation. It would make little difference whether it was shown he was an authorized or self-constituted agent of the defendant corporation, because, in either event, if an impecunious settlement was brought about through his trickery or falsehood, the defendant corporation should not be allowed to take advantage of an unfair settlement thus made, accept the benefit thereof and deprive plaintiff of a trial upon the real merits of the case. *Wilder v. Beede*, 119 Cal. 646, 51 Pac. 1083; *Pope v. J. K. Armsby Co.*, 11 Cal. 159, 43 Pac. 589; *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88."

The rule that, where a fraud is alleged, great latitude is allowed in the admission of evidence is stated in 20 Am. Jur., p. 320, section 345, as follows:

“Whenever issues of duress, undue influence, fraud, and good faith are raised, the evidence must take a rather wide range and may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions. Such matters are ordinarily not the subject of direct proof, but to be inferred from the circumstances, and in all such cases, great latitude of proof is allowed and every fact or circumstance from which a legal inference of the fact in issue may be drawn is competent. The courts generally are liberal in admitting evidence of even slight circumstances tending to throw light upon the relation of the parties and their dealings with each other.”

There can, of course, be no question whatsoever as to the agency of Cameron, the claim agent, who was in charge of the case for considerably more than two months, to represent the defendant in all matters having anything to do with the handling and settlement of the case, including the employment of the physician, and the plaintiffs had the right to assume that he had the authority assumed by him. *Rich v. Edison Electric Co.*, 18 Cal. App. 354, 123 P. 230; *Edmunds v. Southern Pac. Co.*, 18 Cal. App. 532, 123 P. 881.

As to Dr. Blackman, there is, we believe, also no question that the circumstances, including his own testimony introduced by the defendant, were amply sufficient to show the agency.

As a result of the negligence of the defendant, Mrs. Zane was taken to the Indio hospital, which was operated by Dr. Blackman, without any direction or choice on her part, and without even knowing where she was being taken (89). She made no arrangements for her care or treatment at the hospital and was not presented with any bills (104, 105). It is clear that she did not employ Dr. Blackman or the hospital, and that he was not her physician.

On the other hand, the evidence of the defendant shows a close relationship between the defendant and Dr. Blackman (347, 354). In the case of the care and treatment of patients injured in previous Greyhound bus accidents the bills were paid by the Greyhound (398). Immediately after the operation Mrs. Zane, without any direction or arrangement on her part, was taken to a private room which she occupied for more than two months at great expense. It is inconceivable that this would have been done unless the Greyhound made arrangements for her care and treatment. In this connection the Superintendent of the defendant was at the hospital shortly after the accident (344). It is apparent that some arrangements were made for the hospital bill. Mrs. Zane was without funds to pay anything and so told the hospital. Again we repeat that it is inconceivable that a small country hospital would keep a patient for ten weeks in a private room unless some arrangements had been made for her care.

The story of Dr. Blackman as to the arrangement for the care and treatment of Mrs. Zane is most improbable. Certainly, as the plaintiffs had made no arrangement or agreement for her care and treatment and had not been consulted with respect to the private room or the other

large expense that was incurred, there would have been no right to have the payment for this taken out of a settlement, and it is not believable that such an indefinite and contingent arrangement would have been relied upon. Such an arrangement would, however, have made the doctor and the hospital greatly interested in helping the defendant to make a settlement.

The claim agent told Mrs. Zane that Dr. Blackman was their doctor (98), and that the defendant was taking care of the bills (95, 134).

That the defendant arranged with Dr. Blackman for the care and treatment of Mrs. Zane is further proved by the dispute between Mr. Cameron and Dr. Blackman regarding a claimed agreement as to the amount of the bill, which was testified to both by Mrs. Zane and Dr. Blackman himself (111, 112, 388, 389). This dispute conclusively shows that there was an employment by the defendant of the hospital and Dr. Blackman and that they were its agents.

The hospital and doctor's bill was paid by the appellant, and the receipt of the hospital for hospitalization and doctor's care of Mrs. Zane was issued to the appellant and given to it (118, 119).

It is to be noted that the claim agent not only repeated to Mrs. Zane what the doctor had said regarding the injuries, and assured her that she could rely upon this, but also made to her the same representations without reference to the statements of the doctor, and that this was the basis upon which the amount of the settlement was discussed (98). The misrepresentations of the claim agent alone were sufficient to entitle the plaintiffs to recover.

In view of all these facts and circumstances, it clearly appears that Dr. Blackman and the hospital were the agents of the defendant and that they were handling the case of Mrs. Zane for it.

The claim of the appellant that the court allowed hearsay evidence to be introduced that was harmful and prejudicial to the defendant cannot, we submit, be sustained. Certainly, no claim can be made that any of the statements of Cameron, the claim agent, were hearsay. All of his statements were made in the performance of and in connection with his duties for the defendant and pertained to the duties of his agency. All of them were made in connection with and as a part of his settlement negotiations.

3 C. J. S., page 281, par. 322;

Williamson v. Taylor, 129 S. C. 400, 124 S. E. 645.

Since the evidence shows that Dr. Blackman was the agent of the defendant in taking care of Mrs. Zane, his statements cannot be said to be hearsay, and the same applies to the statement of the nurse regarding payment of the bills to which the appellant has objected, which was made in the course of the duties she was performing for the defendant. A statement to the same effect was made by the claim agent (95), which cannot be claimed to have been hearsay, and the evidence shows that the defendant did pay the bills (118, 119, 396). In any event the testimony to which objection has been made was simply cumulative and corroborative, and it is uniformly held by the authorities that any error in the admission of hearsay evidence is deemed to be harmless

and non-prejudicial where such evidence is cumulative or corroborative.

5 C. J. S., page 997, par. 1727;

3 Am. Jur., page 581, par. 1028.

In this connection, counsel for the defendant in their cross examination brought out independently the same evidence of which they complain. In their cross-examination of Mrs. Zane, in reply to a question as to whether Cameron, the first time or two he came was just friendly, she replied:

“Yes, and he assured me there was nothing to worry about, and that they were taking care of all the bills. All I had to do was to get well.” (134).

No objection to this answer or motion in respect thereto was made.

In other respects counsel elicited evidence of agency in their cross-examination. On page 130 of the Transcript of Record it was brought out that Dr. Blackman and Cameron told Mrs. Zane that the Pacific Greyhound Lines was going to pay all the medical bills and the cost of the operation, and that Dr. Blackman told her that the second operation was to make her leg suitable for an artificial limb. 5 C. J. S., page 1018, par. 1735.

It was further brought out on cross-examination that the nurse brought Cameron in and introduced him as an agent from the Greyhound, and that he also gave her a card that had his name on it which said “Claims Agent”, or something of that sort, of the Pacific Greyhound Lines.

Also, the defendant took and introduced in evidence the deposition of Dr. Blackman. His statement that the bills would be taken care of by the Greyhound was admissible,

in addition to the other reasons, to impeach the testimony in the deposition as to his arrangement with the defendant.

4 C.J., page 984, par. 2964, note 64(b).

On this matter of agency the authorities hold that a person who adopts and accepts a release and the benefits accruing therefrom, and claims under it, thereby adopts and ratifies the means and instrumentalities by which the release was obtained. Thus, in the case of *Moses v. Carver*, 298 N. Y. Supp. 378, 164 Misc. 204, cited and relied upon by appellant, the husband of the plaintiff was in no sense the agent of the defendant, but was instrumental in obtaining the plaintiff's signature. The court said:

"The defendant having accepted the result of the efforts of the husband of the plaintiff, is deemed to have adopted the methods employed to achieve those results. *Taylor v. Commercial Bank*, 174 N. Y. 181, 66 N. E. 726, 62 L.R.A. 783, 95 A. S. R. 64; *Bloomquist v. Farson*, supra, 222 N. Y. 375 at page 381; *Parton v. Metropolitan Life Ins. Co.*, 129 Misc. 493, 221 N. Y. S. 610."

In the case of *Chicago R. I. & P. Co. v. Burke*, 175 P. 548 (Okla.) it was held that by adopting and pleading the release, the defendant ratified the act of the surgeon in making the statement to the plaintiff, so as to present an issue of fact whether the release was void for constructive fraud.

A leading case is that of *Bertha v. Regal Motor Car Co.*, 180 Mich. 51, 146 N. W. 389, in which the court said:

"It is a proposition of law too fundamental and too well established to require a citation of authorities that,

if a party adopts even unauthorized acts of another and has received and accepted benefits accruing therefrom, he thereby adopts and ratifies the instrumentalities by which the results were obtained, and is estopped from denying that the agent was authorized to act. So in this case, by accepting this release, which upon its face is *prima facie* a release in its favor and for its sole benefit, by pleading the release as a defense to the suit, by refusing to accept the tender back of money which has been paid to secure the release, by its course of cross-examination to show that it had obtained the release and claiming the benefits of it, by admitting in open court that it had paid Dr. Goux for his services in caring for plaintiff, defendant must be held to have adopted and ratified the acts of the two representatives of the insurance company."

VI.

No notification of rescission or repayment or tender of repayment of the money received for the release was required.

It is argued by counsel for appellant (page 45 of its brief) that it was necessary to notify the defendant of a rescission of the release and that the retention by them of the consideration estopped them from recovery in the case. We think not.

At the time of the settlement and the execution of the release the plaintiffs, by reason of the representations made to them, believed that Mrs. Zane's only injury was the injury to her right foot and lower leg that necessitated the amputation, and this was the only injury that was given any consideration by the parties prior to or at the time of the settlement (98, 107, 108). No recovery is

sought in this action for that injury. The only recovery that is sought is for the injury to the femur or thigh bone which, by reason of the mistake and misrepresentations, was not covered by the release. The release stands as to the injury to the loss of the foot and lower leg.

In such a case there was no necessity for any notice of rescission or repayment, and the authorities cited in appellant's brief have no application. They simply state the general rule in cases where a complete rescission is claimed and suit is brought to recover for all injuries resulting from the accident. This was the situation in the case of *Chicago, etc., Ry. Co. v. Pierce*, 64 Fed. 293, and also in the case of *Colorado Springs and I. Ry. Co. v. Huntling*, 66 Colo. 515, 181 P. 129, cited by appellant.

In the latter case it appears from the opinion that the plaintiff knew all about her injuries at the time she cashed the check. It does not appear at all that there was another distinct injury which was unknown or which it had been represented did not exist. It appears that the plaintiff claimed only that the injury was worse than she had been told it was. She sued for full recovery for her injury, entirely repudiating the release. The distinction between this case and the case at bar is plain. In the case at bar there were two distinct injuries, one of which, by reason of the misrepresentations, the plaintiffs at the time of the settlement believed to be the only injury and for which, therefore, the settlement really was made, and the other of which the plaintiffs were caused to believe did not exist. They seek damages only on account of the unknown injury and claim that the release rightly should be limited to the injury which they were caused to believe was the only injury. In such a case

the authorities hold that no rescission or notice or payment back of money is required.

In the case of *Great Northern Ry. Co. v. Reid*, supra, there was a known injury to the foot, and one of the results of the accident was a hernia, which was not known and consequently was not taken into consideration when the plaintiff settled with the claim agent and gave the release. In reference to this, the court said:

“We think that, under the authorities, there is here sufficient to impeach the settlement so far as it relates to this phase of the controversy and to that extent the release should be set aside.

“We agree with the court below that it should not be disturbed as it respects the injury to his foot. *Lumley v. Wabash R. Co.*, supra, is authority for the partial impeachment of the release.”

In the case of *Lumley v. Wabash Ry. Co.*, 76 Fed. 66 (C.C.A. 6th Cir.) in which a similar state of facts was involved, Judge Lurton, in an opinion concurred in by Judges Taft and Hammond, said:

“In this aspect of the case it is a matter of no importance whether the plaintiff paid back or offered to pay back the money he received. He did, in fact, tender it back some three years after he received it. This delay is unimportant, as the statutes of limitations have not barred his suit, and he was entitled to retain it as a satisfaction for the part of his injury he had understandingly settled.”

In the case of *Atchison, etc., R. Co. v. Peterson*, supra, it was held that no return of the amount paid for the release, or a tender thereof, was required. In that case there was only one injury and the representation

was as to its duration. The plaintiff, therefore, necessarily, sued for all damages resulting from the single injury. In the case at bar, as in the cases above cited, there were two separate and distinct injuries and the plaintiffs sued only for the injury that was not believed to exist at the time of the settlement.

The rule is stated in 53 C. J. 1237 as follows:

“The consideration for the release need not be returned where an action is brought upon a claim not in contemplation at the time of the execution of the release.”

A well reasoned case on the question is *Malloy v. Chicago Great Western R. Co.*, 185 Iowa 346, 170 N. W. 481, stated in the footnotes of the above quotation:

“Where the amount paid was for some specified injury or for loss of time or the like and it is sought in the action to recover for some additional injury not contemplated in the contract of release or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment was for loss of time only, or specific items other than injuries on which the action is based, then and in such event tender of return of the consideration is not essential to the maintenance of the action. This is for the reason that, as to the amount paid * * * the releasee has the benefit of what he has paid for, and the releasor may not recover therefor again.”

In the *Hanson v. Northern States Power Co.*, 268 N. W. 642, cited in appellant’s brief, the court in reference to the defense of laches interposed by the defendant said:

“It is clear that the question of laches has no proper place in this discussion. Plaintiff brought her

suit within six years of the time of the accident, the period of the statute of limitations, and there is no ground upon which the claim of laches can be passed."

The following additional authorities sustain our position on the matter of rescission and the retention of the consideration received for the release:

Backus v. Sessions, et al., 17 Cal. (2d) 380, 110 P. (2d) 51;

Gay v. D. M. Osborn Co., 102 Wis. 641, 78 N. W. 1079;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 P. (2d) 349;

Bliss v. New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65.

Under the Arizona and California cases no tender of consideration is necessary under the facts here involved. It is argued by counsel for appellant that defendant was unable to produce Cameron as a witness by reason of the fact that the plaintiffs did not notify the defendant. Even if material, which we deny, there is no competent evidence in the record to show this, and no competent evidence that Cameron's testimony could not be had. It would seem quite likely that the defendant did not desire the claim agent's testimony.

Considerable space in appellant's brief is devoted to the matter of expenditures made by the plaintiffs. Under the law of the case, this has no bearing. The evidence, however, shows that Mrs. Zane invested in war bonds, purchased a home, and spent a considerable amount for help and doctor's bills on account of the injury which she was told did not exist.

VII.

The court did not err in giving instructions to the jury at the request of the plaintiffs.

Counsel for appellant under paragraph VI of their argument first complain of the giving of plaintiffs' requested instructions Nos. 2 and 5, which appear on pages 447-449 of the Transcript of Record. These instructions correctly stated the law in a case such as this involving representations as to the injuries made to the plaintiffs which were untrue and which caused them to execute the release. The instructions in all respects are in accordance with the law as set forth in paragraph III of this argument and are fully sustained by the authorities therein cited. The same instruction in substance was expressly sustained in the Arizona case of *Atchison, etc., Ry Co. v. Peterson*, supra, the doctrine of which case was fully approved in the California case of *Matthews v. Atchison, T. & S. F. Ry. Co.*, supra.

Since these instructions were predicated on a finding by the jury of false representations inducing the execution of the release, the instructions covered the law of the case and were complete without any further submissions in connection therewith, which would have been improper. Further, no such submissions were requested.

Appellant also complains of these instructions for the reason that they permit recovery for the injury that it was represented Mrs. Zane did not have instead of recovery for all the injuries sustained in the accident. This phase of the case has been fully dealt with and covered in paragraph VI of this argument, and the authorities therein cited sustain in all respects the recovery for the

distinct and separate injury under the conditions set forth in these instructions.

The next instruction to which counsel for appellant object is plaintiffs' requested instruction No. 6 which, as given by the court, appears on pages 449-450 of the Transcript of Record, and which has to do with the matter of the substitution of releases. As we have shown in paragraph IV of this argument, the evidence was amply sufficient to support this instruction. It also is the case that the instruction was full and complete. By it the court did not, as claimed by appellant, instruct the jury that, if the release executed by the plaintiffs was somewhat different from the form of release originally submitted, the jury should find for the plaintiffs, nor did the court by the instruction charge the jury that if there was any difference whatsoever between the two releases, the jury should so find. The instruction set forth the exact differences between the two releases as testified to by Mrs. Zane. There can be no question that, if the release as originally submitted and which the plaintiffs were led to believe they were signing stated the injuries sustained to have been the loss of the right foot and lower leg, this was very materially different from the release that was signed, as is shown in paragraph IV of this argument.

The court did not, as stated in appellant's brief, in this instruction tell the jury that the executed release was wholly void, but on the other hand, told the jury that, if the jury found from a preponderance of the evidence the matters set forth in the instruction, the release was no defense to the action and its verdict should be for the plaintiffs for the damages sustained as a result of the

injury to the femur, this being the other distinct injury not mentioned in the release as submitted. There was no error in the giving of this instruction. If the claim agent led the plaintiffs to believe that they were signing a release that set forth specific injuries, certainly, under the authorities the release that was signed could only have the effect of the release which the plaintiffs were led to believe they were signing, and would serve only as a release so far as the specified injuries were concerned. The plaintiffs therefore still would have the right to sue, as they here did, by reason of the hip or thigh bone injury which was not, as is shown in our paragraph IV above, covered by the release. This is fully sustained by the authorities above cited in paragraph VI of this argument.

It is to be noted that in the court below counsel for appellant did not base their objection to this requested instruction No. 6 on any of the grounds stated in their brief (461, 462).

Counsel for appellant next complain of the giving of plaintiffs' requested instruction No. 10 concerning the measure of damages (450-451). They state that, although plaintiffs sought to set aside a release on the grounds of fraud, they could claim that such release was set aside only in part. This is not an action to set aside a release, but is an action to recover damages on account of an injury which, by reason of the acts of the defendant should not be held to have been covered by the release. That this instruction correctly states the law as to the measure and assessment of damages under the state of facts here involved is held and sustained by the authorities cited in paragraph VI of our argument to which we have referred.

In several places in their brief counsel have stated that the defendant paid the plaintiffs \$15,967.00, this being the sum of the two amounts of \$14,500 received by the plaintiffs and the sum of \$1467 received by the hospital. The amount paid by the defendant to the plaintiffs was \$14,500. The \$1467.00 was paid by the defendant to the hospital and its receipt stating that it had received from the defendant this amount for hospitalization and doctor's care was issued by the hospital to the defendant. As the evidence shows, there was no arrangement whatsoever between the plaintiffs and the doctor or hospital, the plaintiffs were not consulted as to the charges or expenses to be incurred, and they were never presented with any bills for care or treatment.

VIII.

The court did not err in refusing instructions requested by the defendant.

Appellant's first complaint as to the refusal of the court to give certain instructions requested by it has to do with its requested instruction No. 2 (49). For several reasons there was no error in refusing to give this instruction. In the first place, there is no evidence whatsoever upon which to base the submission to the jury of a question as to whether Mrs. Zane attached her signature to the release carelessly or with indifference to her rights.

It cannot be claimed that there was any carelessness or indifference on the part of Mrs. Zane by reason of the fact that she signed a release that was different from the one that had previously been left with her and that

she was led to believe was the release she was signing. Certainly she was justified in assuming and taking it for granted that no release other than the release left with her was being presented for her signature. Counsel for appellant state that it is admitted that the terms of the release were discussed. The only evidence as to a discussion of the terms of the release was that the terms of the release were discussed between Mrs. Zane and her husband and this clearly had reference to the release that had been left by Cameron with Mrs. Zane (145).

There also was nothing upon which to base the submission of the question whether she knew generally that the effect of the release was to bar her right to sue for any injuries although she did not know or suspect such injuries. Since, under all the evidence, the execution of the release was induced and caused by the misrepresentations of the defendant, it could not possibly, under the authorities, have that effect.

Further, the requested instruction entirely disregards the law that, no matter what the provisions the release may contain, it cannot be upheld as covering all injuries if its execution was brought about by misrepresentations on the part of the releasee although unintentionally made. That this is the law is shown by the authorities cited in paragraph III of this argument, including the case of *Moses v. Carver*, supra, cited and relied upon by appellant itself. A person cannot be claimed to have intended that a release should have the effect of barring a cause of action for an injury that she did not believe she had when the reason for this belief was the result of positive representations made to her by the releasee.

As to appellant's complaint because of the refusal of the court to give its requested instruction No. 6 (53) to the effect that the plaintiffs could not recover unless the falsity of the representations was known to the party making them at the time they were made, we have fully covered this phase of the matter, and under the authorities, there was no error in the refusal of the Court to give this instruction.

There was no error in the refusal of the Court to give defendant's instruction No. 9 (55), to the effect that, although the relation of principal and agent existed to some extent between the defendant and Dr. Blackman, unless he had authority to represent the defendant in the negotiation of a settlement, any statements made by him not for the purpose of influencing a settlement subsequently negotiated by an agent of the defendant without knowledge on the agent's part of the statements, could not avoid the release.

First, the evidence is clear and without question or dispute that the claim agent had knowledge of the statements of Dr. Blackman regarding the injuries and that he used, adopted and took advantage of the statements in negotiating and effecting the settlement. The evidence also is clear and without question or dispute that the doctor knew that negotiations for a settlement were being had and that a settlement was contemplated. Under such circumstances, practically all the cases hold it to be unnecessary that the doctor was authorized to negotiate the settlement. There was nothing to warrant the giving of this requested instruction.

Defendant's requested instruction Nos. 13 (57) and 14 (58), which had to do with the matter of rescission and of

repayment of the consideration received for the release, and with the matter of giving the plaintiff credit for the amount paid, were properly refused by the court for the reason that no rescission, notice of rescission, repayment of the consideration, or crediting of the payment made, is necessary or proper in a case involving the facts in the case at bar. This we believe to be clear for the reasons given and from the authorities cited in paragraph VI of this argument dealing with those matters, which it would seem unnecessary here to repeat.

IX.

The court's instructions to the jury were not conflicting, confusing or repetitious.

We fail to find any conflict in the instructions given by the court or that the instructions in any manner were confusing or repetitious. Only six of the instructions requested by the plaintiffs were given, while the court gave eight of the defendant's requested instructions, either as originally drawn or modified. As to the complaint that the court did not further instruct the jury as to the grounds on which the plaintiffs sought recovery, not only was this unnecessary in view of the instructions that were given, but also no request was made by the defendant for further or additional instructions regarding this. If the defendant desired such further instructions it was its duty to request them, 3 Am. Jur. 645, Par. 1127.

CONCLUSION

We submit that the court committed no error in denying defendant's alternative motion for a new trial as argued on page 61 of appellant's brief and, further, that the defendant was ably defended and had the advantage of every right that it was entitled to.

We submit that the defendant did not produce a single witness who had a personal knowledge of the facts that denied the evidence produced by the plaintiffs at the trial except possibly Dr. Blackman and an impartial study of his testimony greatly corroborates the case of plaintiffs.

Mr. Frazee Burke testified that he was assistant manager of the Claims Department of the Western Adjusting Bureau and that Swett and Crawford, whoever they were, owned that corporation; that the Western Adjusting Bureau investigated and adjusted claims for the Pacific Greyhound Lines (327, 335). Burke had the temerity to testify that Cameron was not even an employee of the Greyhound Lines (336, 337) yet the record shows without dispute that he was known in Indio, California, as an adjuster for the Pacific Greyhound Lines and that he was constantly in touch with the plaintiff Zoa H. Zane for a period of nearly three months. If he was not an adjuster for the Greyhound he certainly had everyone in the vicinity of Indio greatly fooled. It would be strange logic indeed for an adjuster to do the things that Cameron did for the Greyhound and then claim that he was not in its employ. The other evidence produced by the defendant was just as logical as the claim that Cameron was not in the employ of the Greyhound.

We do not wish to be melodramatic but we submit that the evidence shows without dispute that the plaintiff Zoa H. Zane, a young woman, mother of two children, suffered an injury due to the negligence of the Greyhound and her right leg was amputated below the knee and that she settled for this injury and the Greyhound got what it bargained for, a settlement of this claim, and had it not been for the fraud and representation of the defendant, its agents and servants, Zoa H. Zane could at least have worn an artificial limb and been half-way normal but due to the fraud, both actual and constructive, Zoa H. Zane was made a hopeless cripple for the remainder of her natural lifetime, to walk around on crutches with her thigh bone moving up and down. We submit that she cannot take even one step, even around the house, without crutches and that she will suffer pain the rest of her natural lifetime.

It is argued by the appellant in its brief that the delay in bringing the suit caused irreparable injury to the defendant. The plaintiffs brought their suit within the statute of limitations which they had a right to do.

The defendant lays great stress on the fact that the plaintiffs spent some of their money for a few luxuries; the defendant even brought out the fact that while her husband was in the Navy fighting for his country for a period of nearly a year Zoa H. Zane hired some help to take care of herself and two children. Whatever Mrs. Zane did with her money she paid for it by having her right leg amputated and she could have done what she pleased with it.

We submit that Zoa H. Zane has never been paid for her fractured hip for which this suit was brought and

that the judgment recovered only partly compensated her for the injuries that she has suffered.

We further submit there is no prejudicial error in the record, that the plaintiffs are entitled to recover and that the judgment of the District Court should be affirmed.

Respectfully, submitted,

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No. 11,194

United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

APPELLANT'S REPLY BRIEF

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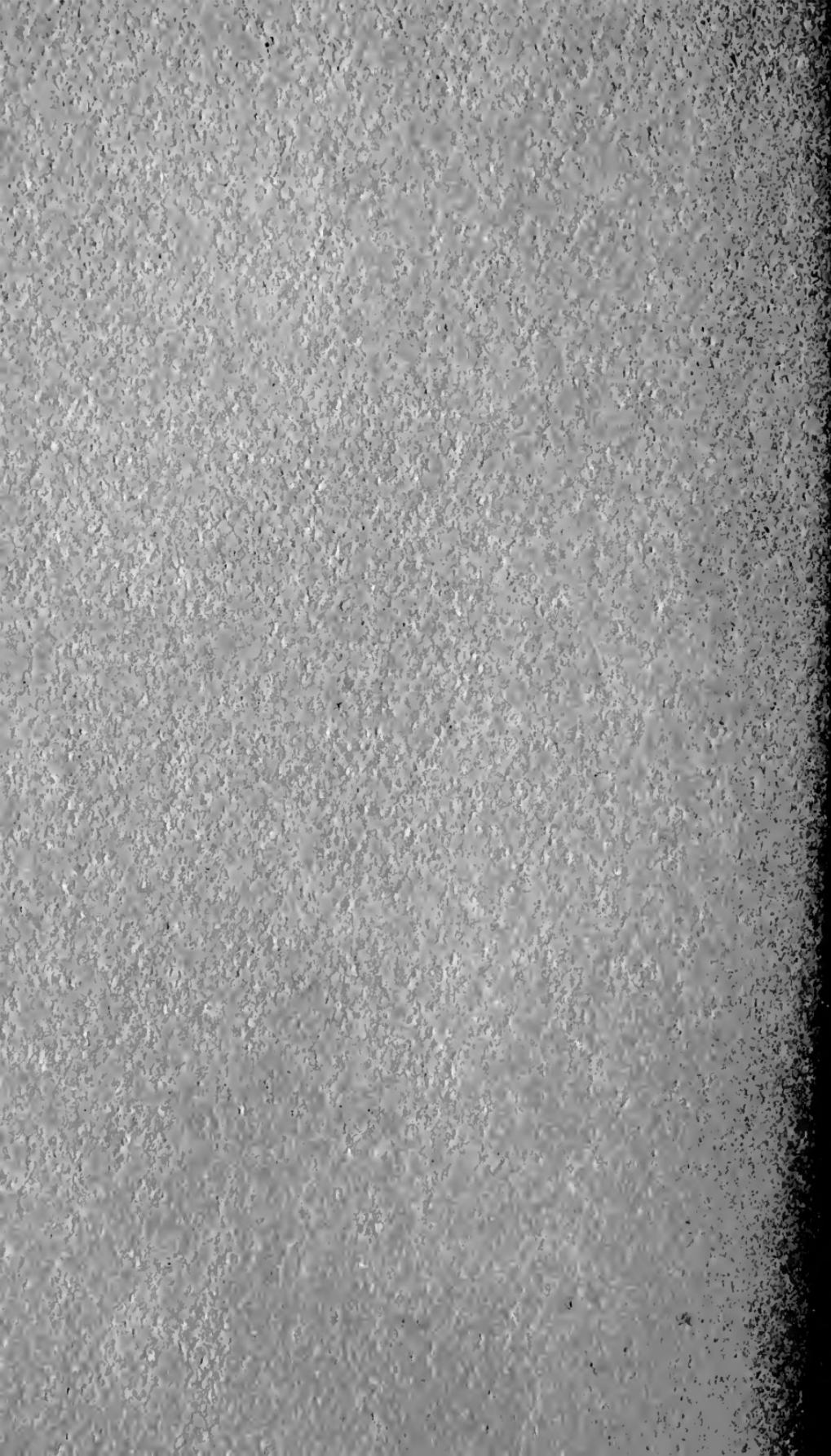
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United States
Circuit Court of Appeals
For the Ninth Circuit

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Appellees.

APPELLANT'S REPLY BRIEF

Upon carefully studying Brief of Appellees we have arrived at the conclusion that in our Opening Brief we anticipated all arguments made by appellees, and that any effort upon our part to answer appellees' brief would only be a re-statement of our Opening Brief except in the following respect:

We believe it will be helpful to the Court for us to briefly reply to Paragraph VI of the Argument in appellees' brief, said Paragraph VI being captioned

"No notification of rescission or repayment or tender of repayment of the money received for the release was required",

said Paragraph commencing on Page 44 of Brief of Appellees. This is apparently intended to answer Paragraph IV of the Argument in Appellant's Opening Brief, said Paragraph IV being captioned,

"The failure of the plaintiffs to notify defendant of the rescission of the release, and the retention by them of the consideration received for the release after they had knowledge of the true facts estops and bars them from recovery in this case",

which Paragraph commences on Page 45 of Appellant's Opening Brief.

Apparently appellees are attempting to impress upon this Court that appellant's only contention is that notice of rescission and restitution of benefits received *was a condition precedent to appellees' right to bring the action*. That is not true. *Our contention is that the appellees by retaining, using and expending the monies received from the appellant for an unreasonable length of time after the discovery of the alleged fraud ratified the release and appellees are barred and estopped from challenging the same*. If, at the time the appellees brought their action, December 9, 1944, they had tendered to the appellant the amount of monies received by them for the release in question, it would not have altered our contention in the least. This is not a question of *a condition precedent* to the bringing of an action, but is a question of an absolute defense on the merits of the action on the ground of ratification by the appellees.

The case of *Atchison, etc Ry. Co. v. Peterson*, 34 Ariz. 292, 271 Pacific 406, relied upon by appellees is not in point. In the Peterson case there was no evidence whatever

that the plaintiff in that case had retained, used or expended any monies received on account of the release after he discovered the fraud. On the contrary, all that you can gather from the recital of facts is that the plaintiff had expended all monies received on account of the release long before he discovered the fraud. The defendant in the Peterson case contended that merely because the plaintiff brought an action to rescind a release he must tender repayment to the defendant of all monies received on account of the release and that such is a condition precedent to the bringing of the action. The effect of a plaintiff retaining and using monies received on account of a release for an unreasonable length of time after the discovery of fraud inducing the execution of the release was not presented nor mentioned in the Peterson case.

The appellees throughout their brief insist that the execution of the release in question was induced by fraudulent representations, intentional or unintentional, on the part of the appellant, or its agents, to the effect that appellee, Zoa Zane, *had received no injury to her hip and that the only injury received by her was to the lower leg resulting in its amputation.* The evidence is conclusive that appellees discovered the fractured hip and the falsity of the representations in August 1943 (Tr. of Rec. 124, 174). The evidence is conclusive that at the time appellees discovered the alleged fraud on the part of the appellant, they had in their possession a substantial portion of the monies paid to them by the appellant for the release, and thereafter used and expended the same (Tr. of Rec. 288-311). The evidence is conclusive that in October, 1943, the appellee, Jack Zane, telephoned to Dr. Blackman in

Indio and accused him of being responsible for Mrs. Zane's condition (Tr. of Rec. 245-246).

The appellees retained, used and expended the monies until the time suit was brought on December 9, 1944, without any notice to the appellant nor any offer to restore the benefits received by them from the release. This clearly was ratification of the release by the appellees. It must be remembered that the appellees throughout this case have contended that the only reason that they executed the release in question was the fact that they were assured by the appellant and its agents that the only injury received by the appellee, Zoa Zane, was the amputation of her lower leg and she had suffered no injury to her hip. In August, 1943, they discovered that such representations were absolutely false and that she had suffered a fractured hip. Nevertheless, they gave no notice to the appellant, continued to expend and use the monies paid to them by the appellant until they had something less than \$200.00 left and then they brought suit. We cannot picture a stronger case of ratification of a contract after the discovery of fraud inducing the execution of the same.

As we have stated we do not deem it necessary to answer any other Argument made by appellees as we consider that we have fully answered the same in our Opening Brief. We merely wish to call the Court's attention that in the Peterson case, supra, the jury was required to give the defendant in that case credit to the extent of \$1,000.00 already paid by the defendant to the plaintiff on account of the release. In the present case the Court not only refused to allow the jury to give consideration to the amount paid by the appellant to the appellees for the release, but also refused to allow the

jury to give any consideration to the fact that appellees had retained and expended monies received by them on account of the release after they had discovered the fraud inducing the same.

Respectfully submitted,

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No. 11,194

United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States
for the District of Arizona

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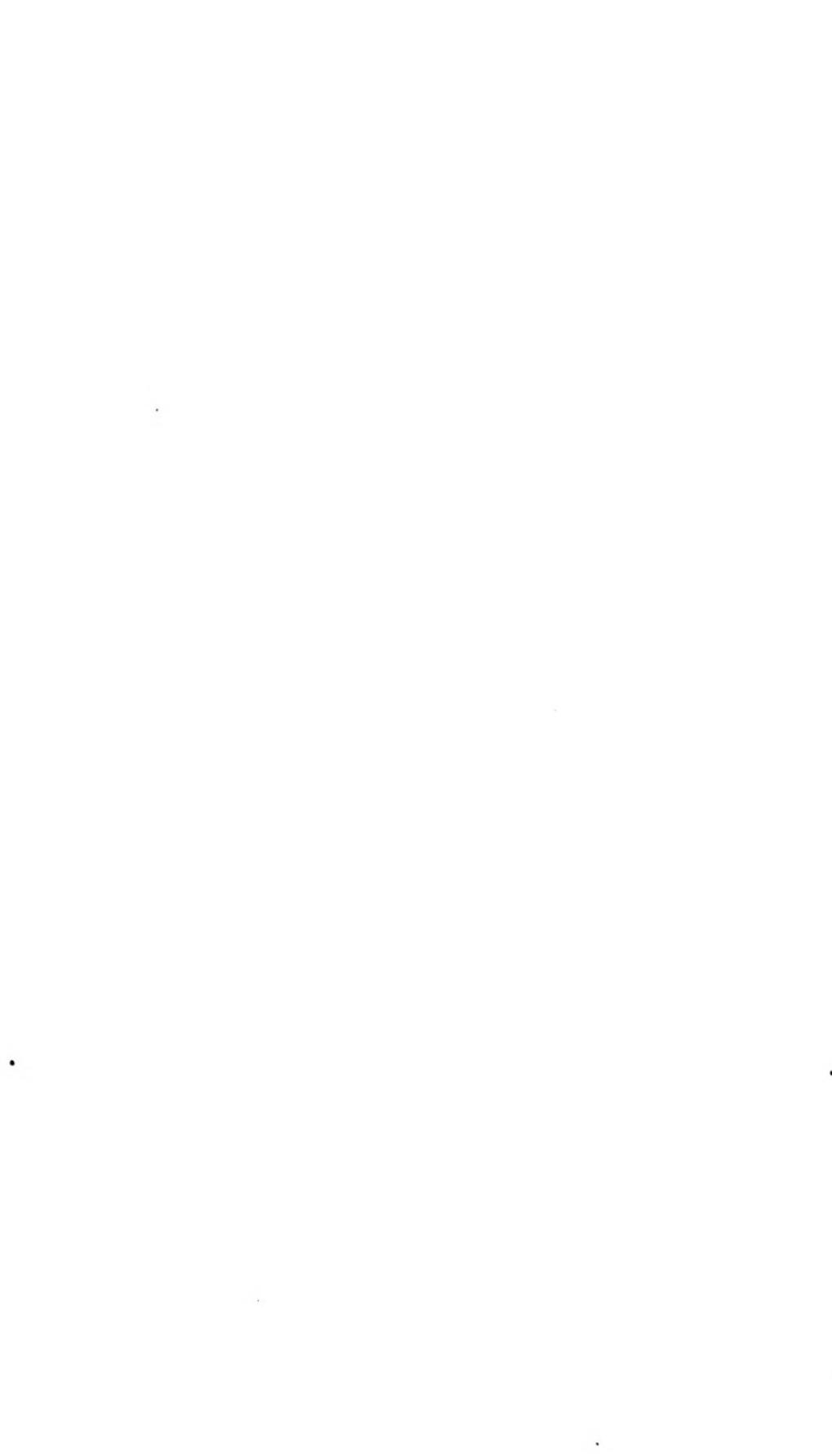
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United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,
vs.
ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States
for the District of Arizona

I.

STATEMENT OF THE CASE ON REHEARING

The case has been reversed and sent back to the District Court for a new trial on the major issue that tender of consideration is required under the California decisions, or what the Circuit Court of Appeals states is "constructive fraud"; and the theory of the appellees being that it is misrepresentation. We believe that the issues have been narrowed down to very few major propositions and we think that the Honorable Circuit Court of Appeals erred, and that the reasons are covered by the assignments of error and propositions of law hereinafter set out.

It is clear from the opinion of the Court that the Circuit Court of Appeals bases its decision on the question that the plaintiffs-appellees based their theory of the case on actual fraud. On page 4 of the opinion, the Court says:

"From the above summary and from an inspection of appellees' complaint, certain matters are made abundantly clear. Appellees based their right of recovery and their right to avoid the purported effect of the said release upon a showing at the trial of *actual fraud* practiced by appellant's agents."

On page 5 of the opinion, the Court says:

"There can be no doubt that both pleadings and proof of appellees made the existence or non-existence of actual and intentional fraud the paramount and decisive issue in this case. It is also clear that appellees relied on the charges and proof of actual fraud to void the release."

On page 6 of the opinion, the Court says:

"Instructions of the foregoing character leave no doubt that the trial court was clearly of the view that appellees had undertaken to rest their case upon the theory and proof that actual and intentional fraud had been practiced upon them which finally resulted in the execution of the release relied upon by appellant."

On page 7 of the opinion, the Court says:

"It seems clear to us that in giving this (plaintiff's requested) Instruction No. 2, the court completely parted company with the trial theory of appellees under which they rested their right of recovery on a showing of actual fraud. This instruction dealt with *constructive* fraud. It clearly authorized the jury to

find for appellees if constructive fraud was shown by the evidence to have characterized acts of appellant's agents."

With the great deference due the Honorable Court, we humbly believe that the Court might be mistaken, and as Al Smith said, "Let's look at the record."

As we set forth on page 2 of our brief, the complaint set forth three causes of action or statements of claim. The first statement of claim does not anticipate the defense of a release and for the purposes of the action was the only statement of claim that it was necessary to set forth, and it sought only the recovery of the damages for the injury to the femur or thigh bone of the plaintiff, Zoa H. Zane.

The second statement of claim or cause of action, like the first, sought recovery only for the injury to the thigh bone or femur and alleged *actual fraud* and misrepresentation on the part of the defendant, its agents and servants. (Italics supplied.)

The third statement of claim is similar to the first statement of claim and sought damages only for the injury to the fractured femur or thigh bone, but did not allege actual or intentional fraud; and the third statement of claim is based upon misrepresentation on the part of the defendant, its agents and servants, and what the Circuit Court of Appeals terms "constructive fraud." It will be borne in mind that the plaintiffs sought in all their theories of the case only damages for the fractured femur bone and not for the amputation of the leg below the knee.

From the pleadings and evidence three theories of the case were submitted to the jury under proper instructions:

First: ACTUAL FRAUD AS TO THE FACTS AND MISREPRESENTATION AS TO THE PHYSICAL CONDITION OF ZOA H. ZANE WHICH LED THE PLAINTIFF TO SIGN THE RELEASE.

Second: EVIDENCE AS TO THE SUBSTITUTION OF RELEASES (IN FACTUM). THAT THE PLAINTIFFS-APPELLEES SIGNED A DIFFERENT RELEASE FROM THE ONE THAT WAS LEFT WITH ZOA H. ZANE AT THE HOSPITAL, BY THE CLAIM AGENT, MR. CAMERON.

Third: MISREPRESENTATION WITHOUT PROOF OF ACTUAL FRAUD AND COVERED BY THE PLAINTIFFS-APPELLEES' REQUESTED INSTRUCTION NO. ", AND THE INSTRUCTION IN WHICH THE CIRCUIT COURT OF APPEALS SAYS THAT THE PLAINTIFFS-APPELLEES PARTED COMPANY WITH ACTUAL FRAUD.

The theory of actual fraud as to the facts and the theory as to misrepresentation were submitted to the jury under the pleadings and were covered thereby. The theory of the substitution of releases (fraud in factum) was developed by the evidence largely by counsel for the defendant, as the record will hereafter show. This theory is permissible without being made an issue by the pleadings, under Rule 54(c) of the Federal Rules of Civil Procedure, which provides:

"* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings or in the alternative, plaintiffs could have proved the substitution of releases based upon the first statement of claims as it did not antici-

pate a release and no reply had to be made to new matter under the Federal Rules of Civil Procedure."

It will be noticed from the time Mr. Carson, of counsel for the plaintiffs, made his opening statement (Tr. 78-84) that the plaintiffs relied on all three theories of fraud, and not one time in the record does it show that the plaintiffs ever wavered on these theories. Any question of tender had nothing to do with the case in so far as the law of California was concerned, but we did argue as a collateral proposition that even under the California cases the plaintiff was entitled to recover even without tender, which will be argued hereafter.

II.

ASSIGNMENTS OF ERROR

The Honorable Circuit Court of Appeals erred in reversing the case and granting a new trial for the following reasons:

1. The Court erred in holding that the plaintiffs-appellees based their case entirely on the question of actual fraud.
2. The Court erred in holding that the trial court erred in giving appellee's requested Instruction No. 2.
3. The Court erred in holding that it was necessary to tender back the consideration received by the appellees before suit could be maintained, as the question of tender of consideration was governed by the law of Arizona, being the law of the forum, and not the law of California, and that no tender had to be made before suit could be maintained in Arizona.

4. The Court erred in holding that the various theories of the plaintiffs-appellees below were inconsistent.

5. The Court erred in not holding that the general verdict in favor of the plaintiffs, where there was no request for special findings, was not conclusive of all the issues in the case.

III.

PROPOSITIONS OF LAW

1. The plaintiffs-appellees did not base their case entirely on the theory of actual fraud, but relied on misrepresentation (what the court terms "constructive fraud"), and actual fraud as to the facts in securing the plaintiffs-appellees to sign the release in question, and actual fraud (*in factum*) as to the substitution of releases.

2. The question of rescission and tender of consideration was governed by the laws of Arizona, and not of California, but no tender of consideration had to be made in order for the plaintiffs to maintain the suit.

3. Even under the California cases, plaintiffs could maintain the suit without rescission.

4. Plaintiffs-appellees were not compelled to elect on any theory in which to bring the suit, but could bring the suit on any theory under the new Federal Rules of Civil Procedure, and a general verdict in favor of the plaintiffs is conclusive upon the defendant.

5. There is sufficient evidence on all issues of fraud to support the verdict in favor of the plaintiffs.

ASSIGNMENT OF ERROR NO. I
and
PROPOSITION OF LAW NO. I

The plaintiffs - appellees did not base their case entirely upon misrepresentation, what the Court terms "constructive fraud," but based their case upon (1) three theories of fraud, (2) misrepresentation as to facts, and (3) actual fraud as to the facts and fraud (*in factum*) in the substitution of releases.

It is true, as set forth in the opinion, that the plaintiffs did plead in their complaint that they were unable to make tender of any consideration received but before the final submission of the case to the jury counsel for the plaintiffs being aware of the legal proposition that the question of rescission and tender of consideration was governed by the laws of the State of Arizona (law of the forum), and basing their theory of recovery that the damages sought was for separate and distinct injuries that had been settled for, the plaintiffs withdrew requested Instruction No. 7. Therefore, the question of tender of consideration was not submitted to the jury in any form and completely abandoned by the plaintiffs and was not considered by the jury in their determination of the issues, resulting in a verdict for the plaintiffs. It was the contention of the plaintiffs at the trial and at every stage of the proceedings that they could rely on any theory of the case, even though inconsistent, as will be argued hereafter.

It will be remembered that Mr. Carson argued the proposition of law before the Circuit Court of Appeals in the oral argument and gave the Circuit Court of Appeals the citation to 53 C.J. 1244, where the rule is laid down that the question of rescission and tender of con-

sideration is governed by the law of the forum. Perhaps we took too much for granted, but in submitting the case to the jury the plaintiffs-appellees knew that the question of rescission and tender of consideration was governed by the law of the forum, and this was a primary reason in asking for Instruction No. 2, which is based upon the Arizona case of *Atchison, Topeka and Santa Fe Ry. Co. v Peterson*, 34 Ariz. 292, 271 P. 406. If the plaintiffs had abandoned the question and theory of misrepresentation, certainly, they would not have requested Instruction No. 2 which is based upon the legal postulate that if Dr. Blackman and the claim agent, Mr. Cameron, were the agents of the defendant, and made false representations to the plaintiff as to the condition of Zoa H. Zane, that the plaintiff could recover although no wrongful intent on the part of the agents was intended to deceive the plaintiff. Of course, it is rather hard to distinguish in any case the border line between false misrepresentation and actual fraud. As we argued in Proposition No. III in our brief, beginning with page 13, that the evidence is clear and beyond question that the representations made by the agents of the defendant were believed and relied upon by the plaintiff, and that the plaintiff would not have executed the release if she had known of the fracture to her thigh bone or femur. See statement of facts in plaintiffs' case on pages 3, 4, 5, and 6 of plaintiffs' brief.

It is clear from the statement of this evidence that Mr. Cameron and Dr. Blackman represented to the plaintiff that her only injury was the injury below the knee and that she would be able to wear an artificial limb, and that she would be a normal person. Because the evidence

did show actual fraud as to the facts, certainly, the plaintiff did not abandon the theory of misrepresentation. This is clearly shown for the reason that the court modified defendant's requested Instruction No. 3 by the insertion of the word "intentional" in Instruction No. 3, modifying the instructions as to intentional fraud. The record shows that the defendant knew that the plaintiff relied both upon intentional fraud as to the facts and as to the substitution of releases and as to false representation. It will be noted that the Court instructed upon both actual fraud as to facts and on the question of misrepresentation, plaintiffs' Instruction No. 2, and we submit that the record shows that the plaintiff relied upon both actual fraud in securing the execution of the release and actual fraud in the substitution of the release and relied upon misrepresentation without proof of actual fraud. It will be noted in T.R., P. 445, that Mr. Baker in his motion for a directed verdict, at the close of all the evidence, argued that there was neither evidence sufficient to show constructive fraud or intentional fraud and we herewith quote from the T.R.:

"* * * three, that there is no evidence (402) showing any intentional fraud upon the part of the defendant; four, that there is no evidence showing any constructive fraud on the part of the defendant; * * *".
(Underscoring supplied.)

The defendants, in their brief on P. 35, Proposition No. II, argued that there was no sufficient evidence to show actual or intentional fraud, and the defendant-appellant also argued that there was no competent evidence as to constructive fraud, beginning with p. 30 and beginning with p. 42, defendant's Propositions I and III,

so it is clearly shown from the record that the plaintiffs did rely upon all theories of fraud, actual and constructive, and this is also shown by the position taken by the defendant-appellant. So we think that the court is in error in saying that the plaintiff relied on actual fraud, but we think the record shows, beyond any doubt that the plaintiffs did not limit their case to the theory of actual fraud.

It will be noticed that Mr. Baker, counsel for the defendant, in his exceptions to Instruction No. 2 did not except on the ground that the question of tender was governed by the law of California, but his exception stated that the plaintiffs "seek to recover on several different theories. This instruction makes no distinction between theories * * *" (Tr. 460). It will be noted that Mr. Baker's reply brief was based on one proposition, not a question of tender, but a question of ratification by the retention of the consideration an undue length of time. This was the basis of the defendant's whole case in reply. We do not believe that the record shows at any place that Mr. Baker contended that the law of California governed as to tender of consideration.

**ASSIGNMENTS OF ERROR NOS. II and III
and
PROPOSITION OF LAW NO. II**

The question of tender is governed by the law of the State of Arizona (the law of the *lex fori*), and not of California; and therefore, as no tender had to be made before trial, the Circuit Court of Appeals was in error in holding that the law of California governed as to rescission and tender.

We come now to the major proposition in the case, which is the question of rescission and tender of consideration. The Court in its opinion on page 8 says:

"This instruction on constructive fraud is therefore erroneous in that nothing is SAID THEREIN RESPECTING THE NECESSITY FOR RESCIS-
SION OF THE RELEASE CONTRACT AND RESTITUTION OF THE CONSIDERATION PAID THEREUNDER." (Underscoring and capitalization supplied.)

Plaintiffs' requested Instruction No. 2 was taken from the *Atchison, etc., Ry. Co. v. Peterson*, 34 Ariz. 292, 271 P. 406, and the Court in the Peterson case instructed the jury that if the agent-physician of the defendant made representations to Peterson as to his condition that the plaintiff could recover even if the physician believed the statements to be true and it was later discovered that they were false. This was the theory in the case at bar. This was the reason for plaintiffs' requested Instruction No. 2.

**The Question of Rescission and Tender of Consideration
Is Governed by the Law of the Forum**

The rule is laid down in 53 C.J. 1244, sec. 65, notes 27 and 28:

"The effect of the failure of a releasor to restore the consideration before bringing suit is governed by the lex fori and not by the law of the state where the release was executed."

This note cites the case of *St. Louis-San Francisco Ry. Co. v. Cox*, 171 Ark. 103, 283 S.W. 31. In the Cox case, supra, the plaintiff, Lulu M. Cox, was injured while a passenger on the train of the St. Louis-San Francisco Ry. Co. She signed a release on the representation of a physician-agent of the company as to her injuries and

she relied on the representation of the physician-agent. She brought an action to set aside the release on misrepresentation. The appellant carrier requested an instruction that before she could recover she must tender the consideration received before the action could be maintained. The injury happened in the State of Missouri, and under the laws of the State of Missouri, before the plaintiff could maintain the action she would have to tender the consideration received. The suit was brought in the State of Arkansas against the carrier. The court rightfully held that while under the Missouri law it was necessary to tender consideration before suit could be maintained that the question of rescission and tender of consideration was governed by the law of the forum, and where the remedy was sought (*lex fori*) and we quote as follows from 5 R.C.L. P. 917, Sec. 11:

“The broad, uncontested rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy.”

We have literally searched every case in the digests, after checking with West Publishing Company up to the time of printing this petition we have been unable to find a single case to the contrary of the rule laid down at 53 C.J. 1244, *supra*, and we do not believe that there is in the entire field of legal jurisprudence. Inasmuch as the question of the instruction was governed by the law of the forum, the Arizona law applies. Under the celebrated case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 Law Ed. 1188, 58 Sup. Ct. 817. The Supreme Court of the United States in overruling *Swift v. Tyson*, 16 Pet. 1, 18, 10 L.Ed. 865, holds that the Federal District Court

takes judicial knowledge of the law of Arizona and will apply the law of Arizona, and the question of tender being governed by the law of the forum, was purely an Arizona question. The Supreme Court of Arizona in passing upon this question has held point blank that under no consideration is it necessary to tender to the defendant the amount received in settlement under the release before suit must be instituted. In the case of *Southern Pac. Co. v. Gastelum*, 36 Ariz. 106, 283 P. 719, 722, the Supreme Court of Arizona held where a release was procured by fraud it was not necessary to tender the amount received before filing suit. In the *Gastelum case*, supra, the court said:

“He did not return or tender the \$350 to defendant before filing suit, and because of this failure the latter contends that he cannot avoid the effect of the release or settlement on the ground of mental incapacity, ignorance, or illiteracy at the time the release was executed and therefore that its demurrer should have been sustained. Following the weight of authority, we have recently held that repayment of the consideration paid for a release secured through fraud, or a tender thereof, is not a condition precedent to the right to institute or maintain an action to recover the damages suffered in an accident occurring during one’s employment. *Atchison, Topeka & Santa Fe Ry. Co. v. Peterson* (Ariz.) 271 P. 406, 410. The grounds upon which this principle rests are applicable here, and we think sound. They were stated in this language: ‘*Some of the decisions base their ruling upon the ground that it would be useless to require a tender where it would be refused, as in the case of the releasee who claims that the release is valid, while others place it upon the ground that the restora-*

tion of that which one is entitled to retain in any event either as a result of the agreement sought to be set aside or of the original liability, is never required.” (Italics supplied.)

The reasoning of the *Cox case*, supra, to our mind, is unanswerable. The Court says:

“See, also *Kilgo v. Continental Casualty Co.*, 140 Ark. 336-343, 215 S.W. 689.

(1) Under the doctrine of the above cases it is not a condition precedent to the maintenance of this action by the appellee that she tender to the appellant the consideration received by her for the execution of the release. In other words, in this jurisdiction the failure of tender is a matter that does not reach to the basis of the right of action itself. It is not a matter of substance relating to the right to maintain an action, but pertains only to the procedure or remedy.

“‘The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself, while the lex fori controls all that is connected merely with the remedy.’ 5 R.C.L. p. 917, Sec. 11.”

It may be true in some of the cases in California that the question of rescission and of tender of consideration is the part of the substantive law of California before suit can be maintained, but certainly it could not have any extra-territorial effect. This question is answered in the *Cox case*, supra, p. 35, as follows:

“But under our decisions, as above stated, a failure to refund or make tender of the consideration for the release in such cases relates only to the remedy, and is not a matter of substance pertaining to the right

of action itself. It is a universal rule that laws relating to the remedy can have no extra-territorial effect. As is said in 5 R.C.L. 941, Sec. 28: '*It is a universally established rule that the affording of remedies in one state for enforcing a contract made in another depends entirely upon judicial comity, and that the remedies and procedure are therefore governed entirely by the lex fori. Considering the matter apart from the principle of comity, there is not the same reason for looking to the intent of the parties in the case of the remedy as in the case of matters pertaining to the substance, for the parties do not necessarily look to the remedy when they make the contract.*' " (Italics supplied.)

Clearly, inasmuch as the question of tender of consideration is governed by the laws of Arizona, the law of the forum, of which both the District Court of the United States and the Circuit Court of Appeals of the United States will take judicial knowledge under the case of *Erie R. Co. v. Tompkins*, supra, we believe the Circuit Court was in error in holding that the law of California governed as to return of consideration.

The rule laid down in the case of *St. Louis-San Francisco Ry. Co. v. Cox*, supra, is reiterated in 11 Amer. Juris., Conflict of Laws, p. 408, Sec. 120, and is cited as a leading case on the question.

"In the consideration of the matter apart from the principle of comity or other principles discussed heretofore, there is not the same reason for looking to the intent of the parties in the case of the remedy as in the case of matters pertaining to the substance, for the parties do not necessarily look to the remedy when they make the contract."

11 Amer. Juris., *Conflict of Laws*, 408, 409:

"They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country."

11 Amer. Juris., *Conflict of Laws*, 409. See Note 17:

"*St. Louis-San Francisco R. Co. v. Cox*, 171 Ark. 103, 283 S.W. 31, citing R.C.L.; *Johnson v. Jones*, 62 Ind. App. 4, 112 N.E. 830, citing R.C.L."

The District Court of the United States under the case of *Erie R. Co. v. Tompkins*, supra, will take judicial knowledge that the law of Arizona is that no rescission or tender of consideration has to be made before suit can be maintained.

20 Am. Jur. Evidence, page 62, Sec. 39, says:

"State Laws in Federal Courts—The reciprocal relations subsisting between the several states and the United States are domestic, not foreign, and since the state courts are judicially cognizant of the Federal Constitution and of the public acts of Congress, the general rule is that the United States courts will, when exercising original jurisdiction, take judicial notice of the public laws and jurisprudence of all the states and territories. This rule has found wide and uniform application and is well intrenched in our system of jurisprudence."

See cases cited under 20 Am. Jur. Evidence, p. 62, note 8; *Hogan v. O'Neill*, 255 U. S. 52, 65 L.Ed. 497; *Pure Oil Company v. Minnesota*, 248 U. S. 158, 63 L.Ed. 180. See also annotation on this question *Adam v. Saenger*, 82 L.Ed. 655. This is the rule in the Ninth Circuit. *Mutual Life Insurance Co. v. Hill*, 97 Fed. 263.

In an action for injuries sustained in a railroad accident in Indiana, instituted in a Federal Court sitting in Ohio, such court will take judicial notice, without pleading or proof, of the applicable laws of Indiana. *Baltimore & O. R. Co. v. Reed* (1915; C. C. A. 6th) 223 F. 689, 10 N. C. C. A. 107 (Writ of certiorari denied 239 U. S. 640, 60 L.Ed. 481, 36 S. Ct. 160).

Inasmuch as the question of rescission and tender of consideration was governed by the laws of Arizona, it was not necessary to tender the consideration before suit could be maintained, and the giving of Instruction No. 2, requested by plaintiffs-appellees, was not error.

Inasmuch as it was not necessary to tender any consideration before maintaining suit the only remaining question is, did the plaintiffs have to give credit on the judgment for any amount received. In the *Peterson case*, supra, there were no separate and distinct injuries and the suit was based upon one injury, and the court did instruct the jury that it should give credit to the defendant for the amount paid. This is not true in the case at bar. The plaintiffs did not bring an action for the recovery for any damages for the amputation below the knee, but only for the injury to the femur or thigh bone, for which she was not paid. This being true she did not have to tender any consideration. We here again reiterate the rule stated on page 47 in our brief:

“The rule is stated in 53 C.J. 1237 as follows:

‘The consideration for the release need not be returned where an action is brought upon a claim not in contemplation at the time of the execution of the release.’ ”

The case of *Malloy v. Chicago Great Western R. Co.*, 185 Iowa 346, 170 N.W. 481, is very clear on this point, as where the parties seek damages for consequent injuries necessarily excluded in computing the consideration paid for the release, or for specific injuries other than that on which the action is based. Nothing could be clearer than this. See authorities cited on pp. 47 and 48 of plaintiffs' brief. In the case of *Jordan v. Guerra*, 23 Cal.(2d) 469, 144 P.(2d) 349, it is held point blank that wherein release was obtained by fraud and that the rule of rescission and return of consideration was not required where a person seeking to avoid the release had been deceived into signing a different release than he thought he was executing and that the settlement would only go to the matters on which the minds of the parties met. In the case at bar the plaintiffs-appellees were induced to sign a different release than they thought they were signing. And on the theory of substitution of releases the release signed by Zoa H. Zane and her husband is absolutely void and no tender of the consideration is required. And plaintiffs boldly take the position that they can recover on any theory whether the release is treated as void or voidable, and that the plaintiffs are not required under the new Federal Rules of Civil Procedure to stick to any particular theory. In the case of *Backus v. Sessions, et al.*, 17 Cal.(2d) 380, 110 P.(2d) 51, it is held that where a party suffered cuts and bruises under the eye that it did not cover injury to the optic nerve which the plaintiff did not know at the time of executing the so-called release, and that no tender of the consideration was required. Where the evidence showed that the party executing the release was not competent when he signed the same be-

cause of his physical and mental condition and his release was void. In the case of *Raynale v. Yellow Cab Co. et al.*, Cal., 300 P.(2d) 991, it is held that there is no need for the tender of consideration but the release does not cover the damages sought. In the case of *Tyner v. Axt*, Cal., 298 P. 537, it is held that where a release was obtained by fraud, where it was represented that the release covered only medical expenses, it was held that no tender of the consideration was required. In the celebrated case of *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, being an action for the death of plaintiff's minor son as a result of being hit by the defendant's automobile, that at a time when deceased had apparently recovered from his injuries and neither plaintiff nor defendant contemplated the death of plaintiff's son, and plaintiff signed a release discharging defendant from all liability for any injuries suffered by plaintiff as a result of the accident. Subsequently, the son died as a result of the effect of an attack of measles upon an unrevealed injury to his spleen suffered when he was knocked down by defendant's car. In discussing the necessity of plaintiff's restoring the consideration received for the release prior to the institution of the present suit, the Court said:

“That the present action in principle is much like the case of *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042.”

In that case the Court held the release only covered what the parties intended it to cover and that no tender of the consideration was required. There was no claim that there was any fraud in the case of *O'Meara v. Haiden*, supra, but the reason the Court held that there was no necessity for the tender of the consideration was that

the release covered a separate and distinct injury than the one sued for. While in this case, also, the Court did hold that if a tender of consideration was made at any time before trial it was sufficient. Although the Court held point blank that no tender of the consideration was necessary where the release covered a separate and distinct injury. The case cites the celebrated case of *Bliss v. N. Y. etc., Railroad*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504, that holds no tender of consideration was necessary when the release covers separate and distinct injuries. And also cites the celebrated case of *Lumley v. Wabash R. Co.* (C.C.A.) 76 F. 66, Sixth Circuit, in which Judge Lurton, who is also a Judge of the Supreme Court of the United States, in an opinion concurred in by Judge Taft, (later President and Chief Justice of the United States) and Judge Hammond, another famous Judge, held that no tender of consideration had to be made for something that was independent of the release and not covered by the action. It would seem that the *Lemley case* is a fairly respected authority. It is a universal principle of equity, as held in the case of *Smith v. Atchison, T. & S. F. R. Co.*, 232 S.W. 290, Texas:

“*That ‘one is never obliged, in an action for rescission, to restore that which in any event he is entitled to retain either by virtue of the contract sought to be set aside, or of the original liability.’*” (Italics supplied.)

Certainly, there is no better known fundamental principle of equity jurisprudence than the above statement. Zoa H. Zane and her husband signed a release for the injuries for the amputation below the knee and not for any injuries to the femur. And, when the action was in-

stituted in Arizona, the plaintiffs did not have any property right or chattel that belonged to the defendant and not bound to return it in any event. And as held in the *Peterson case*, supra, and the *Gastelum case*, supra, by the Supreme Court of Arizona they were not bound to return the money in any event. The above reasoning is one of the further reasons that the plaintiffs withdrew Instruction No. 7, and after the withdrawal of this instruction, the case of *Berry v. Strubble*, 20 Cal. App.2d, 299, 66 P.2d, had no relationship to the case at bar. The case of *Matthews v. Atchison, T. & S. F. Ry. Co.*, 54 C.A.(2d) 549, 129 P. 435, which is squarely in point in the case at bar and the *Peterson case*, supra, and the *Cox case*, supra, holds that the case of *Berry v. Strubble*, supra, does not apply in a fact situation in such a case as the one at bar.

On the question where there is separate and distinct injuries and a settlement is made for a separate and distinct injury and where a releasor intending to release only a portion of his claim, signs an instrument which in fact releases in full because of fraudulent representation, is confined to the portion of the claim which the holder intended to settle. Return of the consideration will be dispensed with and that they only intended to settle that portion of the claim which they had in mind. The editor of A.L.R. in an able discussion of this principle says, at 134 A.L.R. p. 15:

“The principle in question is, however, applicable in certain situations in which the distinction between fraud in the inducement and fraud in the execution would be unavailing. Thus, in a case where no fraud was shown but it was proved that through a mutual

mistake the holder of a claim, intending to release only a part thereof, actually executed a release in full, it could not be held that, upon the ground of fraud in the execution of the release, no return of the consideration paid was necessary, but it could be said that, since the releasor intended to release a portion of his claim and affirmed the release to that extent, he was entitled to the consideration paid him therefor and it was not necessary that he return such consideration as a condition to the avoidance of the release on the ground of mistake." (Italics supplied.)

No tender of a consideration was required under the famous case of O'Meara v. Haiden, supra. It will be noted that 53 C.J. 1237, Note 15, cites the case of O'Meara v. Haiden as a case which is an exception to the general rule that tender of consideration has to be made before the institution of suit, on the theory that a suit is brought on a claim not within the contemplation of the parties at the time of the execution of the release.

And it will be noted further that it does not discuss the question of tender at all or tender at any particular time. While it is true in the case of *O'Meara v. Haiden* that tender was made at the time of trial and the Court held that this was proper, at no time did the Court say that tender was required at all. In fact, the second syllabus of the case in 268 Pacific Reporter, at Page 334, holds point blank that it was not necessary to rescind, release and restore consideration before instituting suit. Case after case is cited where no tender of consideration was required. After citing a large number of cases, on Page 337, the Court reasons that the case of *O'Meara v. Haiden*

is alike in principle to the case of *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042, and the Court says:

"The present action in principle is much like the case of *Meyer v. Haas*, except that no fraud is claimed or proven to have been practiced by the defendant in the procurement of the release involved herein."

It would be rather illogical to argue in one breath that the case of *O'Meara v. Haiden* was like *Meyer v. Haas* on principle where no tender of consideration was required at any stage of the proceedings, and then in another breath argue that tender of consideration was required. It is true in the case of *O'Meara v. Haiden* that it announces the rule generally that under the California law on misrepresentation where the suit is not brought for a separate and distinct injury or partial release, that tender of consideration has to be made, but we submit that there is no authority that holds that under the case of *O'Meara v. Haiden* that any consideration has to be made in a separate and distinct injury such as the case at bar. And it might be noted that this is the opinion of the Editor of A.L.R. on the case of *O'Meara v. Haiden*, 134 A.L.R., Page 95. Certainly if the editors of Corpus Juris and A.L.R. state the principle of *O'Meara v. Haiden* that under *O'Meara v. Haiden* no tender of consideration is required, then we submit that writers of legal jurisprudence of this type are entitled to some consideration; and if under the law of *O'Meara v. Haiden* no tender of consideration was required, the plaintiffs did not have to tender under the California law. The reason that we have stressed this argument so much is not that tender had to be made according to the law of the forum, but on the theory that

no tender was required in Arizona or California, or any other place, for separate and distinct injuries even on any theory where the release was void or voidable.

When the appellant and defendant below in their examination by making out the release as substituted and introducing the same in evidence brought the case squarely within the rule of the cases cited on Page 34 of the brief of the appellee, that is, when in the release there is a particular recital that is followed by general words, the general words are limited and restricted by the particular recital, and this is especially true where the general words are printed and the particular recitals are written in. For the convenience of the Court we herewith again recite:

53 C.J., pages 1241, 1242, par. 61;

45 Am. Jur., pages 693, 694, par. 29;

Texas E. P. R. Co. v. Dashiell, 198 U. S. 521, 49 L.Ed. 1150; 25 S. Ct. Rep. 737;

Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L.R.A. 581 (C.C.A. 8th Cir.);

Lumley v. Wabash R. Co., 76 Fed. 66 (C.C.A. 6th).

It will be noted that the words in this case were partly written and partly oral, as testified to by Zoa H. Zane, and on this theory only covered the injuries that were specified in the release, as was intended, and did not bar an action for an injury to the femur, and no tender had to be made.

When the defendant introduced its Exhibit E in evidence, T.R., p. 177, showing the release as it was when it was left with Zoa H. Zane at the hospital, then the defendant brought the case squarely within the *Dashiell case*, supra, decided by the Supreme Court of the United

States, and established beyond any doubt the theory of the plaintiffs on the substitution of releases.

A party who introduces a written document is conclusively bound by the document as cited in the case of *McClung Const. Co., Inc. v. Langford Motor Co.*, Court of Civil Appeals of Texas, 33 S.W.2d 749, and the Court in this case says:

“(3) In 10 R.C.L. p. 1098, par. 289, it is said: ‘Conclusiveness against Party Introducing Document.—As a general rule documentary evidence is held to be conclusive against the party introducing it. He may not impeach it, and he will not be permitted to accept a part which is in his favor and repudiate another part which is opposed to his claim or defense. And this applies as well to documents forming a part of a record of a cause as to other documents.’”

“In 17 Ann. Cas., p. 381, note, it is said:

‘As a general rule documentary evidence is held to be conclusive against the party introducing it. He may not impeach it, and he will not be permitted to accept a part which is in his favor and repudiate another part which is opposed to his claim or defense.’”

Certainly, the defendant cannot object on the ground of inconsistency of causes of action when the defendant proved the substitution of releases beyond any reasonable doubt. And if there was any error in claiming actual fraud, which these plaintiffs stoutly deny, then the error was invited by the defendant, and it cannot complain thereof. From the foregoing cases it will be seen that under no theory on this earth, under the ruling of the Arizona courts were the

plaintiffs compelled to tender any consideration before instituting action in Arizona.

PROPOSITION OF LAW NO. III

Even under the California cases plaintiff could maintain the suit without rescission

It will be seen from the previous argument on Assignment of Error No. 2, and Proposition of Law No. 2, that even under the California cases, the plaintiffs did not have to tender consideration before bringing the action, as from the proof, the release was void on the theory in *O'Meara v. Haiden*, supra, that the release covered separate and distinct injuries from the one sought in this suit.

ASSIGNMENT OF ERROR NO. IV

and

PROPOSITION OF LAW NO. IV

The court erred in holding that the various theories of the plaintiffs-appellees were inconsistent, so as to prevent recovery under the few Federal Rules of Civil Procedure, and a general verdict in favor of the plaintiffs is conclusive upon the defendant.

As we have heretofore shown the Court, the case went to the jury on two theories covered by the pleadings: *one*, actual fraud and misrepresentation that induced the plaintiffs to sign the release; *two*, misrepresentation induced by Dr. Blackman and Mr. Cameron based upon misrepresentation, although the representations of Dr. Blackman and Mr. Cameron were believed by them (Dr. Blackman and the claim agent, Mr. Cameron); *three*, fraud in the substitution of releases. The third theory was not covered by the pleadings but was covered by Rule 54(c) as set forth in the Federal Rules of Civil Procedure even

if it is not covered by the pleadings. It might be noted on the third theory that counsel for the plaintiffs did not know nor did the plaintiffs know that there had been a substitution of releases until they saw the release introduced in evidence that set forth the sum of \$15,967.00, defendant's Exhibit B, T.R., p. 143. It will also be noted that plaintiffs in their second and third statement of claim stated that a release had been signed containing the sum of \$14,500.00 and covering the injuries below the knee. It might also be noted here, as we argued in our brief, that the expenses in the hospital for care of Zoa H. Zane was on a day to day basis and the defendants could not have possibly known the exact amount to fill in the release until the day settlement was made. We might note here that Rule 54(c) was made to cover situations exactly like the one in the case at bar.

Plaintiffs-appellees were not compelled to elect on any theory and could bring the suit on any theory that was proved by the pleadings in the evidence under the new Federal Rules of Civil Procedure and the general verdict in favor of the plaintiff was conclusive upon the defendants. The Court reasons on p. 10 of its opinion that the jury was at liberty to find a general verdict for the appellees which could have rested on testimony which fell short of establishing the existence of actual fraud, but did prove or tend to prove the existence of constructive fraud. The Court further reasons that the presence of conflicting instructions provides no assurance that the error did not affect the jury verdict, and at best the jury was left to take its choice between two inconsistent theories of recovery. We admit that the plaintiffs could have rested their case on so-called constructive fraud as

termed by the Court, covered by Instruction No. 2. Plaintiffs' theory of misrepresentation based upon the *Peterson case*, supra, and the general verdict would stand as it was based upon proper evidence and covered by the proper instructions and we also state that the jury could have based its verdict upon actual fraud in the substitution of releases. Also, we might state here that the new rules of the Federal Rules of Civil Procedure were made to cover a fact situation like this one in the case at bar.

Under the new Federal Rules of Civil Procedure, Rule 8(a), plaintiff may file in one complaint, a statement of claim in the alternative, a claim or claims even though they be inconsistent and he cannot be compelled to elect on which claim he stands. In the case at bar no motion for election was made. Not one single objection was made in the trial that required election. The courts have uniformly held that even if a motion for election was made no election could be compelled to elect between the different statements of claim, although they be inconsistent.

See, *Fidelity Deposit Company v. Krout*, Cir. Ct. of Appeals, 146 Fed.2d 531, also, *Reconstruction Finance Corp. v. Goldberg*, C.C.A., 143 F.2d 752.

Certainly, it was the purpose in adopting the new Federal Rules of Civil Procedure to cover a situation exactly like this. Surely, the plaintiffs did not have to content themselves with any theory or any particular theory.

In *Kraus v. General Motors*, 27 F. Supp, 537, in passing upon a motion to require the plaintiffs to elect the Court said:

“Turning to the second remedy applied for, and in connection therewith, Rule 8(a) (3) of the Federal Rules of Civil Procedure states in part as follows:

'Relief in the alternative or of several different types may be demanded.' ''

At the Proceedings of the Institute on Federal Rules, Dean Charles E. Clark stated, with reference to this rule that:

"As a matter of fact, all that should be expected of either party or his attorney, is that he tell what he knows about the case, the accident or the breach, or whatever happens, and that he shall not be required to pick and stick to one theory of law or one theory of fact, only to find when he gets to trial that he has chosen the wrong one."

The Court further' says in *Kraus v. General Motors*, supra :

"The Court is entirely in accord with the above, and is of the opinion that plaintiff need make no election at this time because of the inconsistency of his causes of action. Rule 8 is very clear and definite on this point. The case of *Marie Catanzaritti, etc. v. Lina Bianco*, D.D. 25 F. Supp. 457, decided November 28, 1938, by Watson, D.J., may serve to elucidate the Rule. In that case, it is said that: 'Under the present practice there is no objection to an action which proceeds on inconsistent theories entitling the Plaintiff to different remedies, depending on which theory is established. A party may set forth two or more statements of a claim alternately or hypothetically and may state as many separate claims as he has regardless of consistency and whether based on legal or on equitable grounds or on both (Federal Rule 8(e) (28 U.S.C.A. following section 723e)), and relief in the alternative or of several different types may be demanded.' ''

For an able discussion of the question under the new Federal Rules of Civil Procedure see the case of *Reconstruction Finance Corporation v. Goldberg*, 7th C.C.A., 143 F.2d 752, where an action was brought on three theories and the Court held that the plaintiff could not be compelled to elect any particular theory to prosecute his action and after discussing the question the Court quotes from Rule 53(c). Quoting from this case as follows:

"It will be noted that plaintiff alleged three theories upon which it sought to fix defendant's liability; (1) as a shareholder in the trust; (2) as a partner; and (3) as a trustee. Defendant makes much of the point that the Court erred in denying his motion to require the plaintiff to elect on which of these so-called inconsistent remedies it predicated its right to recovery. We think there is no merit in this contention. We doubt if plaintiff by such allegation was pursuing inconsistent remedies. After all, the main question for decision was whether defendant was the real or beneficial owner of the bank stock, and the most that can be said of the complaint is that it stated different theories on which such ownership might be shown. But even though inconsistent remedies were alleged, such practice is permissible under the Federal Rules of Civil Procedure. Rule 8(e) provides:

"‘A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.’

"On the other hand, a number of courts have decided against defendant's contention. *Ottinger v. General Motors Corp.*, D.C. F. Supp. 508; *Kraus v.*

General Motors Corp., D.C., 27 F. Supp. 537; *Munzer v. Swedish American Line, et al.*, D. C., 30 F. Supp. 789. Furthermore, Rule 54(e) provides:

“ * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings.” ”

Certainly, under the above authority, the plaintiff could rely on any theory covered by the pleadings or evidence and it would stand. We think that the Court erred in its reasoning that the jury could take its choice between two so-called “inconsistent theories of recovery.” The plaintiffs could recover on any theory or theories even if they were inconsistent. This was the very purpose of adopting the new Federal Rules of Civil Procedure, and as reasoned by Dean Charles E. Clark, now judge of the Second Court of Appeals, the plaintiffs were not required to pick or stick to any one theory of law or fact, only to find that when they went to trial that he had chosen the wrong one. Inasmuch as the Court properly instructed the jury on all theories the plaintiffs can recover on any one theory.

ASSIGNMENT OF ERROR NO. V
and
PROPOSITION OF LAW NO. V

The general verdict in favor of the plaintiffs where there was no request for special findings was conclusive on all issues in the case.

The defendant could have required a special findings but did not request any, and he is certainly bound by the

general verdict of the jury, and the legal presumption is that a verdict is always favored and that any theory or theories supported by the evidence is proper. Inasmuch as the law of tender of consideration was governed by the laws of Arizona, the law of the forum, and not California, and there being abundant evidence on any theory to support the verdict of the jury on any theory, the verdict must stand. The Court further says on pages 10 and 11 of the opinion:

“Had there been a special or fact-verdict, or if the general verdict had been coupled with answers to fact-interrogatories clearly indicating that the general verdict was rested on proof of actual fraud, we would know to a certainty that giving the instruction on constructive fraud was harmless error. As it is, we are unable to determine and therefore cannot say that it affirmatively appears from the whole record that giving these inconsistent instructions was harmless error.”

The answer to this is that the defendant did not request any special findings and it was not necessary for the jury to determine any theory of fraud, and certainly there could be no error in giving the instructions which the Court terms “inconsistent”. While before the adoption of the new Federal Rules of Civil Procedure, these theories might have been termed inconsistent, under the new Federal Rules of Civil Procedure, they are permissible, and certainly, the defendant is bound by a general verdict on any theory. See also the case of *Fidelity Deposit Company v. Krout*, 146 F. 531.

Under Rule 18(a) the plaintiff in his complaint can join with independent or alternate claims, either legal or

equitable or both, as he may have against the other party and it is not ground for misjoinder as it was before the adoption of the new Federal Rules of Civil Procedure. See commentary from 45 W. Va. L. Q. 5 in *U. S. Code Annotated*, Vol. 28, p. 508, and where the parties are the same there is no restriction as to joinder of any type of claims or as to any number of claims, especially where they arise out of the same transaction, occurrence or series of transactions. Discussion is very enlightening, and the commentary is, in part:

“As to joinder of causes of actions, the new rules introduce what might be said to be a novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great field of discussion and argument over technical points respecting joinder.” 45 W. Va. L. Q. 5.

In the case of *Betts et al., v. Gahagan et al.*, 212 F. 120, Fourth C.C.A., it is held:

“APPEAL AND ERROR (Sec. 930)—VERDICT—PRESUMPTIONS. Where the pleadings raised two issues, and on the trial one was supported by evidence, and the other not, a favorable verdict will be sustained on appeal on the presumption that the jury based its verdict on the issue supported by the evidence.”

In the case of *Cross v. Ryan*, 124 F.2d 883, 884, C.C.A. Seventh Circuit, certiorari denied, 62 Sup. Ct. 1269, 316 U. S. 1269, 86 L.Ed. 1735, it is held that:

“Where each count in complaint was held to have stated a cause of action, if there was substantial evidence to sustain any one count in favor of plaintiffs, the general verdict would be upheld.

“The Circuit Court of Appeals, in determining sufficiency of evidence to support causes of action stated in complaint, does not weigh the evidence or pass upon the credibility of the witnesses, but looks only to substantial evidence that supports the verdict.”

See *Hellier's Estate*, Cal. 145 P. 1008:

“General verdict in evidence where several issues are tried is submitted to the jury, a general verdict must stand if the evidence on one alone is sufficient to sustain it.”

In the case of *Sessions v. Pac. Improvement Co.*, 206 P. 653, Cal., it is held that where it is a case submitted to the jury on two counts and there is evidence to support either, the verdict must stand.

Where a case is submitted to the jury on different theories the verdict will not be set aside because different inferences could have been drawn from the verdict. See *Apache Ry. Co. v. Shumway*, Ariz. 158 P.2d 142.

As we have heretofore reasoned, the Court always on appeal, resolves any presumption in favor of the verdict that is rendered. As reasoned in the case of *Betts, et al., v. Gahagan, et al.*, supra.

We think that it is unquestionably true that there is ample evidence from the record, as we have heretofore

argued, to support the verdict on any theory, and that the defendant having failed to request any special findings is bound by the verdict and the presumption is that the verdict is supported by any theory proved by the pleadings and evidence.

The case of *Aaronson v. City of New Haven*, 94 Conn. 690, 110 A. 872, 12 A.L.R. 328, is a case of what the courts would call a dark horse case, and to our mind is very apropos even under the new Federal Rules. Certainly if the defendant wants a case submitted to the jury and wants findings on any particular issue, it should request special interrogatories as provided by the rules; and this case holds, citing other cases and followed by other cases, that where a case is submitted to a jury on different counts or different theories and there is evidence to support one and not the other, and in the absence of a request for special findings where there is a general verdict the presumption is that the jury based its verdict on the proper theory and the proper proof. On this question the Court says in the Aaronson case:

“Another question remains to be considered. As already stated, the verdict was a general one, and it imports that the jury has found all the issues for the plaintiff. One good and sufficient specification of negligence, to wit, that the defendant neglected to remove the obstruction within a reasonable time after notice, was alleged and supported by credible testimony, and the damages to be awarded are no more or no less, whether one or both issues of negligence were found for the plaintiff. That being so, the verdict must stand. (Citing cases.) As was said in *Foster v. Smith*, 52 Conn. 451: ‘If the evidence justified the verdict on either defense, the judgment must

stand. That it was sufficient to sustain the defense of payment, we have already seen. We have no occasion, therefore, to inquire whether it was sufficient to sustain the finding that there was no new promise to pay the debt. For the same reason it is hardly necessary to inquire whether the charge on that question was correct.'

"In such cases the defendant may protect itself from any possible injustice, when the complaint contains two or more counts, by asking for a separate verdict upon each count, or, when two or more issues are presented in one count, by asking the court to propound special interrogatories to the jury." (Italics supplied.)

We believe that the error in not requesting special findings, as held in the *Aaronson case*, supra, and the fact that a general verdict was rendered, that the general finding is conclusive on the defendant. In the case of *Miller v. Advance Transp. Co.*, 126 F.2d 442, certiorari denied, 317 U. S. 641, 63 Sup. Ct. 32, 87 L.Ed. 516, the Court of Appeals of the Seventh Circuit passed squarely on a similar question, and held that even if there was error in submitting the case to the jury on one theory of negligence and there was evidence of other theories that the jury could find that the case would be affirmed. It seems to us that this case is squarely in point, especially in view of the fact that no request was made for special findings, and it would certainly seem that under the new Federal Rules of Civil Procedure, and since certiorari was denied by the Supreme Court of the United States, that even if there was error in submitting the case to the jury, which the plaintiffs most vehemently

deny, then the case should be affirmed on the theory that the general verdict is conclusive.

The question is further answered in the case of *Foster v. Moore-McCormack Lines*, 131 F.2d 907, certiorari denied, 318 U. S. 762, 63 S. Ct. 560, 87 L.Ed. 1134, wherein the celebrated Judge Frank said:

“There was a general verdict, and such a verdict ‘throws its mantle of impenetrable darkness over the operations of the jury.’ Appellant might have dissipated that darkness by asking, under Rule 49, Rules of Civil Procedure, 28 U.S.C.A. following section 723c, for a special verdict or for a general verdict accompanied by the jury’s answers to interrogatories. * * * unless the trial judge or one of the parties invokes Rule 49. But that wise rule, which would ensure keeping the jury in its proper place, is, for some dark reason, seldom used.”

Another interesting case which we think bears on the question is the case of *Beau v. Western N. C. Ry. Co.*, 12 S. E. 600, wherein an action by a railway employee for personal injuries wherein defendant pleaded a release, instead of a single issue as to the validity of the release the court submitted to the jury three issues, viz: whether the plaintiff executed the instrument thinking it was a receipt for wages, whether at the time the release was obtained plaintiff was suffering bodily pain and mental anxiety due to his injuries, and whether by reason of such suffering he was unable to comprehend the effect of the release. It is held that the procedure was not prejudicial to the defendant. It seems to us that in the case at bar when the jury determined all the issues, the defendant could not be prejudiced.

We submit that even if there was error, which these plaintiffs most stoutly deny, that a general verdict and finding on any particular theory was conclusive, and the cases cited by the Court on page 11 of the Opinion would have no application, because in these cases no question of inconsistency in the rule or in theories applied. But inasmuch as there was no error in any of the instructions, certainly the verdict must stand.

On p. 11 of the Opinion, the Court cites three criminal cases and one civil case on the question of giving inconsistent instructions. Of course, if inconsistent instructions are given which are not in accordance with law, then we would say that it would be error, but where instructions are given, though inconsistent in theory, under the new Rules which are proper, we can hardly see where they would be considered erroneous unless we misunderstand the meaning of the new Rules. The case is cited by the Court on p. 11 of the opinion, *Bollenbach v. United States*, 326 U. S. 607, was a case where the Court gave improper instruction on consideration on the question of possession of stolen property. In the *Bihn v. United States*, 328 U. S., June 10, 1946, case the Court gave a prejudicial instruction on the question of conspiracy to violate a gasoline rationing statute. In the *Ah Fook Chang v. United States*, 9 Cir., 91 F.2d 805, case the Court gave an erroneous prejudicial instruction under the narcotics law. In the *Lynch v. Oregon Lumber Co.*, 9 Cir., 108 F.2d 283, case the court gave, in an action for negligence in the Oregon law, an improper instruction and a mingled comment on the evidence. Admittedly in these cases the instructions were prejudicial, but we can hardly see the application to the case at bar as the plaintiffs have a right to try their case on inconsistent theories under the new Rules.

IV.

CONCLUSION

We are not unmindful of the great care and patience and long months of study which the Court has given to this case, but may we kindly suggest with due deference to this great and honorable Court that due to the fundamental error in holding that the question of tender was governed by the law of California and not holding that no tender was required where there was a separate and distinct injury or a partial release, according to the cases we have cited we believe that the case must be affirmed on rehearing. Certainly the Court does not mean to limit the plaintiffs to any one theory, and under the opinion of the Court as it stands the plaintiffs would be required to proceed on one theory of the case, and this is not in accordance with the new Rules, because it is apparent from the facts that the plaintiffs are not in a position to tender the consideration in order to proceed under the California theory of mutual mistake or what the Court terms constructive fraud, or even actual fraud. And without proper direction it would be dangerous for the plaintiffs to proceed, because if it is true that the question of tender is governed by the law of the forum, certainly plaintiffs would not have to make any tender at any time. So certainly the opinion of the Court must be modified on rehearing, unless the Court still says that the question of tender is governed by the law of California. We submit that inasmuch as no tender was required under the Arizona cases and even under the California cases, including the celebrated case of *O'Meara v. Haiden*, the case should be affirmed on rehearing.

Remember this well, it makes very little difference what happens in the case so far as the defendant is concerned; its buses will keep rolling. And by this we do not mean to say that if there is fundamental error in this case, the case should not be reversed, but we say that the record fails absolutely to show such error. If the defendant thought that it was prejudiced by any instruction, it should have required a special finding; and having failed to do so, it should now not complain. We do not wish to be evangelical or pontifical, but we believe that the record shows that the plaintiff at the beginning of the war had started to California to get a job at a war plant, and had one of her children with her. In one breath her body was mangled and her leg had to be amputated below the knee, due to the admitted negligence of the defendant and due to the brutal, wilful, criminal negligence of the defendant she was made a hopeless cripple for life, because of the wilful negligence of its agents and servants. Remember this well, that the plaintiff Zoa H. Zane will be compelled the rest of her life to go around on crutches with a bodily injury where she will suffer intense pain the rest of her natural life, and at best it is little reward that the jury did give her. The defendant even complained of the money that Zoa H. Zane spent for taking care of her children while her husband was in the Navy. This is somewhat of a paradoxical reward for patriotism.

We submit that if the fundamental law is that the question of tender was governed by the law of Arizona, which we think it is, that there is not a scintilla of error in the record and the case should be affirmed promptly on rehearing; or if the Court has any doubt about the legal phases of this case, it should grant a rehearing and permit further argument.

We do not think that the plaintiff should be saddled with a cost bill of nearly \$1200 on this record. May we kindly suggest that the Greyhound has had its day in court and that there is no fundamental error in the record, and let it go its way and sin no more. We believe under the new Rules and under the fundamental theory of the law that this case is entitled to be affirmed, and like the biblical saying of old, "The letter of the law killeth, but the spirit of the law giveth life."

We submit that the appellant should be granted a rehearing in any case.

Very respectfully submitted,

TERRENCE A. CARSON
111 Physicians Building,
Phoenix, Arizona

STAHL & MURPHY
By FLOYD M. STAHL

JOHN A. MURPHY
822 Title & Trust Building,
Phoenix, Arizona

Attorneys for Appellees

CERTIFICATE OF COUNSEL ON REHEARING

We, the undersigned attorneys for the appellees in this cause, do hereby certify that in our judgment the Petition for Rehearing is well founded and that in our judgment it is not interposed for the purpose of delay.

TERRENCE A. CARSON

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Phoenix, Arizona

STAHL & MURPHY

By FLOYD M. STAHL

JOHN A. MURPHY

822 Title & Trust Building,
Phoenix, Arizona

Attorneys for Appellees

Petition to Stay Mandate

In order for plaintiffs to apply for writ of certiorari to the Supreme Court of the United States.

Comes now, Zoa H. Zane and Jack Zane, plaintiffs in this action and petitions the honorable Circuit Court of Appeals for a stay of the mandate in said cause if the plaintiffs' petition for rehearing is denied until the plaintiffs can apply to the Supreme Court of the United States for a writ of certiorari, and said petition is based upon the following grounds:

I.

That, we believe that the honorable Circuit Court of Appeals has rendered decisions in conflict with other Circuit Court of Appeals in construing the Federal Rules of Civil Procedure in holding that the plaintiffs' theories of the case were inconsistent, and we believe said decision

is in conflict with *Fidelity Deposit v. Krout*, C.C.A. 146 F.2d 531; *Reconstruction Finance Corporation v. Goldberg*, 143 F.2d 752, and in doing so, has decided an important federal question of law that we believe has not been settled by this court.

II.

And, for the further reason, that the honorable Circuit Court of Appeals erred in holding that the law of California governed as to the matter of tender or rescission, when in truth and in fact the law of Arizona, the law of the forum, governed. And it was not necessary for the plaintiffs to make tender of consideration before instituting suit because the claim on which suit was based was for a separate and distinct injury than for which the release was given, and we believe that if a petition for rehearing is denied, that the mandate should be stayed until the plaintiffs can apply for a writ of certiorari to the Supreme Court of the United States.

CERTIFICATE OF COUNSEL ON PETITION TO STAY MANDATE

We, the undersigned attorneys for the appellees in this cause, do hereby certify that in our judgment the petition to stay mandate is well founded and that in our judgment it is not interposed for the purpose of delay.

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Phoenix, Arizona

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Attorneys for Appellees

No. 11197

United States
Circuit Court of Appeals
for the Ninth Circuit.

J. A. HAGEN, individually, and doing business as
El Rey Cheese Co., JACK AROS and EVER-
ETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JAN 25 1946

PAUL P. O'BRIEN,
CLERK



No. 11197

**United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Central Division

No. 4819-BH—Civil

CHESTER BOWLES, Administrator, Office of Price Administration,

Petitioner,

vs.

J. A. HAGAN, Individually, and doing business as EL REY CHEESE CO.; JACK AROS and EVERETT HAGAN,

Respondents.

PETITION FOR AN ORDER REQUIRING RESPONDENTS TO TESTIFY AND TO PRODUCE CERTAIN DOCUMENTS

Chester Bowles, Administrator of the Office of Price Administration, Petitioner herein, applies to this Honorable Court, pursuant to Sections 205(a) and 202(e) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23; U.S.C.A. Title 50 App., Sections 901-946), as amended, (Pub. L. 383, 78th Cong. 2nd Sess.; Pub. L. 108, 79th Cong. 1st Sess.), hereinafter called the "Act," for an order requiring respondents and each of them to testify and produce certain documents described in the Subpoena Duces Tecum hereinafter mentioned. In support hereof, petitioner respectfully represents as follows: [2]

1. At all times herein mentioned J. A. Hagan was and now is an individual doing business under

the fictitious firm name and style of El Rey Cheese Co. at 119-121 North Eastern Avenue, in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned Jack Aros was and now is the bookkeeper, agent, employee and attorney-in-fact of respondent J. A. Hagan, doing business as El Rey Cheese Co., located in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned respondent Everett Hagan was and now is the manager, agent and employee of respondent J. A. Hagan, doing business as El Rey Cheese Co., located in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above-entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned respondents and each of them were and now are engaged in the business of selling, at wholesale, various types of cheeses subject to the provisions of Maximum Price Regulation No. 280, as amended, Revised Maximum Price Regulation No. 289, as amended, and the General Maximum Price Regulation, as amended.

2... Jurisdiction of this proceeding is conferred upon this Court by Sections 205(c) and 202(e) of the Act.

3. Your petitioner is empowered under the provisions of Section 202(a) of the Act to make such studies and investigations, to conduct such hearings and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation [3] or order under the Act or in the administration and enforcement of the Act, and regulations and orders issued thereunder, and to assist him in carrying out said powers the Administrator is empowered to require by subpoena any person to appear and testify or to appear and produce documents, or both, at any designated place.

4. On or about May 24, 1945, petitioner deemed that an investigation to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the regulations thereunder was necessary to assist in the administration and enforcement of the Act and regulations thereunder, and such investigation was commenced on or about said date on petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employe of petitioner.

5. In conducting said investigation, it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Co. in the regular course of busi-

ness, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation No. 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation No. 22, as amended, and Section 5 of Maximum Price Regulation No. 289, as amended, and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

6. On several occasions, said investigator requested of respondents and each of them herein that they allow an inspection by the Office of Price Administration of certain records of respondents and each of them pertaining to the sale of certain cheeses subject to Maximum Price Regulation No. 280, as amended, and Maximum Price Regulation No. 289, as amended, which records are described in Exhibit "A" hereto attached, but respondents and each [4] of them refused the inspection of said records.

7. Thereafter, under date of June 9, 1945, a Subpoena Duces Tecum was signed and issued by John O'Conor, Acting District Director of the Los Angeles District Office of the Office of Price Administration, on behalf of the petitioner, directing respondents and each of them to appear before the aforesaid Clyde P. Cowgill to testify and to produce the documents and records described in said Exhibit "A," at Room 441 (425), 1031 South

Broadway, Los Angeles, California, on the 11th day of June, 1945, at the hour of 8:00 A. M.

Petitioner is informed and believes and upon such information and belief alleges that said subpoenas duces tecum were served personally on the respondents, Jack Aros and Everett Hagan, on the 9th day of June, 1945, as shown by the Affidavit of Merle B. Swan, attached hereto and made a part hereof, showing the serving of one duplicate original each of said Subpoena Duces Tecum upon Jack Aros and Everett Hagan.

8. Respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in the subpoena. Respondents and each of them refused to and did not produce any of the documents and records described in said Subpoena Duces Tecum (Exhibit "A") at the time and place designated therein nor at any time in response to said subpoena, and respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoena.

9. Thereafter, under date of August 2, 1945, petitioner himself signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C," at Room 441, 1031 South Broadway, Los Angeles, California, the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on

the 16th day of [5] August, 1945, at the hour of 9:00 A. M.

Petitioner is informed and believes and upon such information and belief alleges that said subpoenas were personally served on respondents Jack Aros and Everett Hagan on the 13th day of August, 1945, in Los Angeles, California, as shown by said affidavit of Merle B. Swan attached hereto and made a part hereof. True copies of said subpoenas, setting forth the documents respondents and each of them were required to produce, are attached hereto, marked Exhibits "B" and "C" and made a part hereof by this reference as completely as though set forth herein at length.

10. Respondents and each of them refused to and did not appear to testify at the time and place designated in said subpoenas issued by petitioner and respondents and each of them have not since appeared to testify in response to said subpoenas. Respondents and each of them refused to and did not produce any of the documents and records described in said subpoenas at the time and place designated therein, nor at any time or place in response to said subpoenas, and respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoenas.

11. Petitioner is informed and believes and upon such information and belief alleges that all of said documents described in said subpoenas and required to be produced by them are now and were

at the time of the issuance of said subpoena relevant and material to the said investigation, and that the testimony of respondents and each of them required by said subpoenas is also relevant thereto.

Petitioner is informed and believes and upon such information and belief alleges that the documents required by said subpoenas to be produced are now and at all times herein mentioned have been under the control of the respondents Jack Aros and Everett Hagan or either of them. [6]

Wherefore, petitioner Chester Bowles, Administrator of the Office of Price Administration, prays that

1. An order to show cause shall issue forthwith, directing respondents and each of them to appear before this Court on a day certain to be fixed in said order, and show cause, if any there be, why an order should not issue requiring the respondents and each of them to appear in order to testify and produce the documents described in said subpoenas duces tecum before an officer designated by the Administrator at such time and place as this Court may order;

2. Upon return of the order to show cause, an order shall issue requiring respondents and each of them to appear to testify and to produce before such officer at such time and place as this Court may order the documents described in said subpoenas duces tecum; and

3. The petitioner may have such other and further relief as may be necessary or appropriate.

H. EUGENE BREITENBACH,
WM. U. HANDY,
ELEANOR SHUR.

By ELEANOR SHUR,
Attorneys for Petitioner. [7]

State of California,
County of Los Angeles—ss.

Eleanor Shur, being first duly sworn, deposes and says:

That she is an Enforcement Attorney for the Office of Price Administration, Los Angeles District Office, and she is one of the attorneys for petitioner in the foregoing Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents. That she has read the foregoing petition and knows the contents thereof to be true of her own knowledge except for such matters as are stated on information and belief, and as to such matters she is informed and believes the contents to be true.

ELEANOR SHUR.

Subscribed and sworn to before me this 28th day of September, 1945.

[Seal] SAMUEL R. GARB,
 Notary Public in and for said
 County and State.

My Commission Expires Feb. 4, 1949. [8]

EXHIBIT "A"

(Copy)

United States of America
Office of Price Administration
SUBPOENA DUCES TECUM

To: Everett Hagan and Jack Aros, El Rey Cheese Co., 119-121 North Eastern Avenue, Los Angeles, California.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Clyde P. Cowgill of the Office of Price Administration, at 1031 South Broadway, Room 441 (Rm. 425) in the City of Los Angeles on the 11th day of June, 1945, at 8 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including June 8, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including June 8, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese. [9]

Fail Not at Your Peril.

In Witness Whereof, the undersigned, Acting District Director of the Office of Price Administration, has hereunto set his hand at Los Angeles, California, this 9th day of June, 1945.

/s/ JOHN O'CONOR,
Acting District Director. [10]

EXHIBIT "B"

(Copy)

United States of America
Office of Price Administration

SUBPOENA DUCES TECUM

To: Jack Aros, Bookkeeper, Agent and Attorney-in-Fact of J. A. Hagan, d/b/a El Rey Cheese Company.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Eleanor Shur, Enforcement Attorney of the Office of Price Administration, at 1031 South Broadway, Room 441, in the City of Los Angeles, on the 16th day of August,

1945, at 9 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including July 28, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss [11] Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

Fail Not at Your Peril.

In Witness Whereof, the undersigned, Price Administrator of the Office of Price Administration, has hereunto set his hand at Washington, D. C. this 2nd day of August, 1945.

/s/ CHESTER BOWLES,

Price Administrator. [12]

EXHIBIT "C"

(Copy)

United States of America
Office of Price Administration

SUBPOENA DUCES TECUM

To: Everett Hagan, Manager of El Rey Cheese Company, 119-121 North Eastern Avenue, Los Angeles, California.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Eleanor Shur, Enforcement Attorney, of the Office of Price Administration, at 1031 South Broadway, Room 441, in the City of Los Angeles, on the 16th day of August, 1945, at 9 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including July 28, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchase, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere

Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries [13] made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

Fail Not at Your Peril.

In Witness Whereof, the undersigned Price Administrator of the Office of Price Administration, has hereunto set his hand at Washington, D. C., this 2nd day of August, 1945.

/s/ **CHESTER BOWLES,**

Price Administrator. [14]

State of California,
County of Los Angeles—ss.

AFFIDAVIT OF MERLE B. SWAN

Merle B. Swan, being first duly sworn, deposes and says:

That affiant is an investigator in the employe of the Los Angeles District Office of the Office of Price Administration.

That on June 9, 1945, affiant received a Subpoena Duces Tecum signed by John O'Conor, Act-

ing District Director of the Los Angeles District Office of the Office of Price Administration, in the form of the copy marked Exhibit "A" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Everett Hagan and Jack Aros, respondents herein, at 119-121 North Eastern Avenue, Los Angeles, California, by delivering a duplicate original thereof to Everett Hagan personally and a duplicate original thereof to Jack Aros personally, and exhibiting the original thereof to each of said respondents.

That on August 13, 1945, affiant received a Subpoena Duces Tecum signed by Chester Bowles, petitioner herein, in the form of the copy marked Exhibit "B" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Jack Aros, respondent herein, at 3948 South Grand Avenue, Los Angeles, California, by delivering a true copy thereof to said Jack Aros personally and exhibiting the original thereof to him.

That on August 13, 1945, affiant received a Subpoena Duces Tecum signed by Chester Bowles, petitioner herein, in the form of the copy marked Exhibit "C" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Everett Hagan, respondent herein, [15] at 119-121 North Eastern Avenue, Los Angeles, California, by delivering a true copy thereof to said Everett Hagan

personally and exhibiting the original thereof to him.

MERLE B. SWAN,

Subscribed and sworn to before me this 1st day of October, 1945.

[Seal]

SAMUEL R. GARB,

Notary Public in and for Said County and State.

My Commission Expires Feb. 4, 1949.

[Endorsed]: Filed Oct. 10, 1945. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF ELEANOR SHUR

State of California,

County of Los Angeles—ss.

Eleanor Shur, being first duly sworn, deposes and says:

That she is an attorney in the employe of the Office of Price Administration.

That on or about June 9, 1945, on behalf of petitioner herein, affiant caused to be drawn a Subpoena Duces Tecum, pursuant to Sections 202(b) and 202(c) of the Emergency Price Control Act of 1942, as amended. That a copy of said subpoena is attached to the petition herein and marked Exhibit "A." That said subpoena [17] was signed by John O'Conor, who on the 9th day of June, 1945, was Acting District Director of the Los Angeles

District Office of the Office of Price Administra-tion.

That subsequent to June 9, 1945, and prior to June 11, 1945, William Leavitt, who purported to be the attorney representing Everett Hagan and Jack Aros, and the El Rey Cheese Company, telephoned the Enforcement Division of the Los Angeles District Office of the Office of Price Administration and stated that the time allowed on said subpoena was too short and, therefore, his clients would not appear. That affiant, subsequent to the service of said subpoenas and subsequent to said telephone call, but prior to 8 o'clock A. M. on June 11, 1945, telephoned said William Leavitt and was informed by him that, under no circumstances, would he permit his clients to answer to said subpoenas but would require that the Los Angeles District Office of the Office of Price Administration obtain a subpoena signed personally by Chester Bowles.

That affiant was informed and believed that Chester Bowles, at that time, was absent from the National Office of the Office of Price Administra-tion and, therefore, affiant did not communicate with said National Office until June 26, 1945, at which time affiant wrote a memorandum to Fleming James, Jr., Director of the Litigation Division of the National Office of the Office of Price Administra-tion, setting forth the information which affiant desired to obtain from Everett Hagan and Jack Aros, and the El Rey Cheese Co., and requesting that said Fleming James, Jr., obtain the sig-

nature of Chester Bowles on a Subpoena Duces Tecum directed to said Everett Hagan and Jack Aros, and the El Rey Cheese Co., and requiring that said persons appear before an officer of the Los Angeles District Office of the Office of Price Administration and testify to certain matters and produce certain records.

That under date of August 2, 1945, the Los Angeles District Office received a Subpoena Duces Tecum directed to Jack [18] Aros (attached to the petition herein and marked Exhibit "B" thereto) and a Subpoena Duces Tecum directed to Everett Hagan (attached to the petition herein and marked Exhibit "C" thereto), each of said documents purporting to bear the signature of Chester Bowles. That accompanying said subpoenas was a memorandum directed to George Shaw, Acting Chief, Food Enforcement Section, Attention: Eleanor Shur, from Fleming James, Jr., setting forth, in part, that "the originals have been signed personally by the Administrator."

That, according to the affidavit (attached to the petition herein) of Merle B. Swan, an investigator of the Office of Price Administration, Everett Hagan and Jack Aros were each served personally with the said appropriate Subpoena Duces Tecum by the delivery of a true copy thereof to each of them personally and exhibiting the appropriate original thereof to each of them.

That on the 15th day of August, 1945, in the forenoon thereof, affiant telephoned the home of Abraham Gottfried, who purported to be one of the

attorneys representing Everett Hagan and Jack Aros, and the El Rey Cheese Co., and informed him that, although other Federal employes had been given a holiday on both the 15th and 16th of August, 1945, by proclamation of the President of the United States, affiant had not taken advantage of said holidays, was working, and would be present in the Los Angeles District Office of the Office of Price Administration on the 16th day of August, 1945, at 9 o'clock A. M., which time was the return date on the subpoenas duces tecum which had been served on Everett Hagan and Jack Aros, and that affiant further informed said Abraham Gottfried that she would be present in said Los Angeles District Office for the purpose of obtaining the records and taking the testimony of the persons named in said subpoenas duces tecum and served by Merle B. Swan.

That on the 16th day of August, 1945, said Abraham Gottfried appeared at the Los Angeles District Office alone without [19] either Everett Hagan, Jack Aros, or any other representative of the El Rey Cheese Co., and made a statement, which statement was recorded and transcribed by Tilley Geppert, an employee of the Los Angeles District Office of the Office of Price Administration, in the presence of affiant and Abraham Gottfried. That said Abraham Gottfried left the Los Angeles District Office prior to the completion of the transcription of said statement and that on the 17th day of August, 1945, the original and a copy of said transcription was sent to Abraham Gottfried's of-

fice for his signature. A copy of said transcription of said statement by Abraham Gottfried is attached hereto and marked Exhibit "1."

That at no time since August 16, 1945, nor at any time prior thereto, have J. A. Hagan, Jack Aros, Everett Hagan nor any other representative or agent of or attorney for the El Rey Cheese Co. appeared at the Office of Price Administration to testify and/or to produce the documents and records subpoenaed by the subpoenas attached to the petition herein and marked Exhibits "B" and "C" thereto.

ELEANOR SHUR.

Subscribed and Sworn to before me this 4th day of October, 1945.

[Seal]

SAMUEL R. GARB,

Notary Public in and for Said
County and State.

My Commission Expires Feb. 4, 1949. [20]

EXHIBIT No. 1

In the presence of Eleanor Shur, Enforcement Attorney, and Tilley Geppert, on August 16, 1945, at the hour of 9:00 A.M., in the Enforcement Division of the Los Angeles District Office of the Office of Price Administration, Room 441, 1031 South Broadway, Los Angeles, California, Abraham Gottfried, attorney for Everett Hagan and Jack Aros, appeared on behalf of said Everett Hagan and Jack Aros specially in answer to Subpoenaes Duces Tecum issued on August 2, 1945,

by Chester Bowles, Administrator of the Office of Price Administration, and makes the following statement.

I am appearing specially on behalf of Everett Hagan and Jack Aros for the purpose of quashing the issuance and service of the alleged Subpoena Duces Tecum served upon Everett Hagan and the alleged Subpoena Duces Tecum served upon Jack Aros. The grounds are as follows:

1. The President of the United States by Executive Order has declared August 16, 1945, a legal holiday for all Federal offices. I was advised by telephone communication to my home on August 15, 1945, by Miss Eleanor Shur that despite the fact that the Federal offices would be closed she would be present in Room 441, 1031 South Broadway, Los Angeles, California, for the purpose of taking the testimony and inspecting the documents referred to in the aforesaid alleged Subpoenaes Duces Tecum; that this communication reached me too late to communicate with my clients prior to the time said alleged Subpoenaes Duces Tecum were returnable.

2. I question the authenticity of the subpoenaes and state that, in my opinion, the said Subpoenaes Duces Tecum were not signed by Chester Bowles, whose signature purportedly appears thereon.

3. The said Subpoenaes Duces Tecum do not grant the notice required by law in that said Subpoenaes Duces Tecum were served on the 13th day

of August, 1945, and required an appearance on the 16th day of August, 1945. [21]

4. Said Subpoenaes Duces Tecum violated the Fourth Amendment of the Constitution of the United States.

5. The information requested in said Subpoenaes Duces Tecum is not material to any investigation authorized or contemplated by the Office of Price Administration or by the Price Administrator, nor is the proposed testimony nor the proposed records within the authority of the Office of Price Administration to elicit, demand or obtain.

Dated: August 16, 1945.

/s/ ABRAHAM GOTTFRIED.

Witnesses:

.....

.....

[Endorsed]: Filed Oct. 10, 1945. [22]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition of Chester Bowles, Administrator of the Office of Price Administration, filed on the 10th day of October, 1945, and the affidavits of Merle B. Swan and Eleanor Shur filed in support thereof, and good cause appearing therefor,

It Is Hereby Ordered that respondents and each of them show cause, if any there be, before the above entitled Court on the 29th day of October, 1945, at 10 o'clock a.m. or as soon thereafter as counsel can be heard in the Court Room of said Court at Room 6, U. S. Post Office and Court House [27] Building, Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, why an order should not issue requiring respondents and each of them to appear before an officer of the Office of Price Administration at such time and place as this Court may require, to testify and to produce the documents described in the subpoenas duces tecum attached to the petition filed herein.

It Is Further Ordered that service of this Order to Show Cause be made by serving a copy thereof together with a copy of the petition filed herein and copies of the affidavits of Merle B. Swan and Eleanor Shur upon said respondents and each of them on or before the 17th day of October, 1945.

Dated at Los Angeles, California, this 10th day of October, 1945.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1945. [28]

[Title of District Court and Cause.]

REPLY OF RESPONDENTS J. A. HAGAN, INDIVIDUALLY AND DOING BUSINESS AS EL REY CHEESE CO.; JACK AROS AND EVERETT HAGAN, TO ORDER TO SHOW CAUSE ISSUED OCTOBER 10, 1945, AND RETURNABLE OCTOBER 29, 1945, AND MEMORANDUM IN OPPOSITION TO PETITION FOR AN ORDER REQUIRING RESPONDENTS TO TESTIFY AND PRODUCE CERTAIN DOCUMENTS

Respondents, Jack Aros and Everett Hagan, in reply to the Order to Show Cause hereinbefore issued in the above entitled matter on the 10th day of October, 1945, and in opposition to the petition for an order requiring respondents to testify and produce certain documents, respectfully represent as follows:

I.

There has been no showing that the subpoenas in question were served personally upon all of the respondents named in the Order to Show Cause, nor has there been any showing that the Order to Show Cause has been served upon all of the respondents named therein.

II.

That there has been no sufficient showing that the subpoenas in question were executed and issued by Chester Bowles, the Price Administrator; that the petition on its face discloses that [29] the allegations of execution are based purely on hearsay.

III.

That the books, papers, documents and testimony referred to are not relevant or material to any investigation which the Office of Price Administration is authorized to make, and there has been no showing that such books, papers, documents or testimony are relevant and material to the investigation. Before the court can issue any order there must be proof of the materiality and relevancy of said books, documents and records.

IV.

There has been no showing which commodity is being investigated, nor which of the regulations issued by the Office of Price Administration governs the sales of said commodity. In this respect three regulations are referred to in the petition, each requiring the keeping of different records, and each covering different commodities.

V.

That there has been no failure of respondents to answer and appear at the time and place called for in said subpoenas.

VI.

That the respondents are unable to determine what documents are required or referred to by the letters "etc." appearing in said subpoenas.

VII.

That the said subpoenas constitute an unreasonable search and seizure contrary to the Fourth

Amendment to the Constitution of the United States.

VIII.

That the said subpoenas violated respondents right against self incrimination, contrary to the Fifth Amendment to the Constitution of the United States.

Wherefore, respondents, Jack Aros and Everett Hagan, pray [30] that the petition be denied and dismissed, and that no Order issue in this matter, and that the issuance and service of the alleged subpoenas be quashed.

Respectfully submitted,

ABRAHAM GOTTFRIED

Attorney for Respondents

[Endorsed]: Filed Oct. 29, 1945. [31]

[Title of District Court and Cause.]

AFFIDAVIT

County of Los Angeles,
State of California—ss.

Jesus Aros, being served herein as Jack Aros, being first duly sworn, deposes and says:

That he is informed and believes, and on the basis of said information and belief, denies that on or about May 24, 1945, petitioner deemed that an investigation was necessary to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the

regulations thereunder to assist in the administration and enforcement of the Act and regulations thereunder, and based upon said information and belief further denies that such an investigation was commenced on or about said date on the petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employ of petitioner. [39]

That affiant is informed and believes, and based upon said information and belief, denies that in conducting said investigation it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Company, in the regular course of business, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation 22, as amended, and Section 5 of Maximum Price Regulation 289, as amended, and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

That affiant is informed and believes, and therefore alleges, that the subpoena served upon him was not executed by Chester Bowles, the Administrator of the Office of Price Administration; that affiant is unable to ascertain from the said subpoena what books, records, ledgers, day books, purchase and sales invoices, and what other records are required

to be produced pursuant to the subpoena set forth as Exhibit "C" in the petition since affiant is unable to ascertain what is meant by the word "etc."

That affiant denies that said Clyde P. Cowgill requested of respondent and each of them that they allow an inspection by the Office of Price Administration of certain records or any records, and affiant denies that respondents and each of them refused the inspection of said records.

That affiant further denies that under date of June 9, 1945, a subpoena duces tecum was signed and issued by John O'Conor, Acting District Director of the Los Angeles District Office of the Office of Price Administration on behalf of the petitioner and directing respondents and each of them to appear before Clyde P. Cowgill to testify and to produce documents and records on the 11th day of June, 1945, at the hour of 8:00 a.m. [40]

That affiant denies that respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in said subpoena; and affiant denies that respondents and each of them refused to and did not produce any of the documents and records described in the subpoena duces tecum at the time and place designated therein, nor at any time in response to said subpoena; and further denies that respondents and each of them refused the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes and on the basis of said information and belief, denies that thereafter under date of August 2, 1945, petitioner

signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C" of the petition, in Room 441, 1031 South Broadway, Los Angeles, California, of the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on the 16th day of August, 1945, at the hour of 9:00 a.m.

That affiant further denies that respondent and each of them refused to and did not appear to testify at the time and place designated in said subpoena allegedly issued by the petitioner, and denies that respondents and each of them have not since appeared to testify in response to said subpoena; that affiant further denies that respondents and each of them refused to and did not produce any of the documents and records described in said subpoena at the time and place designated therein, nor at any time or place in response to said subpoena; and affiant further denies that respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes, and upon such information and belief denies that all of said documents described in [41] said subpoenas and required to be produced by affiant are now and were at the time of the issuance of said subpoena relevant and material to said investigation, or any investigation, and denies upon such information and belief that the testimony of respondents and each

of them required by said subpoenas is also relevant thereto.

That affiant is informed and believes, and upon such information and belief, denies that the documents required by said subpoenas to be produced are now and at all times mentioned in the petition have been under the control of the respondents Jack Aros and Everett Hagan, or either of them.

That all the books and records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Company are the property of J. A. Hagan, doing business as the El Rey Cheese Company, and are not under the control of affiant nor are they affiant's property.

JESUS AROS

Subscribed and sworn to before me this 26th day of October, 1945.

[Seal]

MACARIO V. BALLESTEROS

Notary Public in and for said
County and State.

Received copy of the within affidavit this 29th day of October, 1945.

ELEANOR SHUR

Attorney for Petitioner

[Endorsed]: Filed Oct. 29, 1945. [42]

[Title of District Court and Cause.]

AFFIDAVIT

County of Los Angeles,
State of California—ss.

Everett Hagan, being first duly sworn, deposes and says:

That he is informed and believes, and on the basis of said information and belief, denies that on or about May 24, 1945, petitioner deemed that an investigation was necessary to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the regulations thereunder to assist in the administration and enforcement of the Act and regulations thereunder, and based upon said information and belief further denies that such an investigation was commenced on or about said date on the petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employ of petitioner.

That affiant is informed and believes, and based upon said information and belief, denies that in conducting said investigation it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Company, in the regular course of business, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation 22, as amended, and Section 5 of Maximum Price Regulation 289, as amended, and

the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

That affiant is informed and believes, and therefore alleges, that the subpoena served upon him was not executed by Chester Bowles, the Administrator of the Office of Price Administration; that affiant is unable to ascertain from the said subpoena what books, records, ledgers, day books, purchase and sales invoices, and what other records are required to be produced pursuant to the subpoena set forth as Exhibit "C" in the petition since affiant is unable to ascertain what is meant by the word "etc."

That affiant denies that said Clyde P. Cowgill requested of respondents and each of them that they allow an inspection by the Office of Price Administration of certain records or any records, and affiant denies that respondents and each of them refused the inspection of said records.

That affiant further denies that under date of June 9, 1945, a subpoena duces tecum was signed and issued by John O'Conor, Acting District Director of the Los Angeles District Office of the Office of Price Administration on behalf of the petitioner and directing respondents and each of them to appear before Clyde P. Cowgill to testify and to produce documents and records on the 11th day of June, 1945, at the hour of 8:00 a.m. [44]

That affiant denies that respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in said subpoena; and affiant denies that respondents and

each of them refused to and did not produce any of the documents and records described in the subpoena duces tecum at the time and place designated therein, nor at any time in response to said subpoena; and further denies that respondents and each of them refused the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes and on the basis of said information and belief, denies that thereafter under date of August 2, 1945, petitioner signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C" of the petition, in Room 441, 1031 South Broadway, Los Angeles, California, of the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on the 16th day of August, 1945, at the hour of 9:00 a.m.

That affiant further denies that respondents and each of them refused to and did not appear to testify at the time and place designated in said subpoena allegedly issued by the petitioner; and denies that respondents and each of them have not since appeared to testify in response to said subpoena; that affiant further denies that respondents and each of them refused to and did not produce any of the documents and records described in said subpoena at the time and place designated therein, nor at any time or place in response to said subpoena; and affiant further denies that respondents and each of them have not permitted the inspection of any of

said documents at any time in response to said subpoena.

That affiant is informed and believes, and upon such information and belief denies that all of said documents described in [45] said subpoenas and required to be produced by affiant are now and were at the time of the issuance of said subpoena relevant and material to said investigation, or any investigation, and denies upon such information and belief that the testimony of respondents and each of them required by said subpoenas is also relevant thereto.

That affiant is informed and believes, and upon such information and belief, denies that the documents required by said subpoenas to be produced are now and at all times mentioned in the petition have been under the control of the respondents Jack Aros and Everett Hagan, or either of them.

That all the books and records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Company are the property of J. A. Hagan, doing business as the El Rey Cheese Company, and are not under the control of affiant nor are they affiant's property.

EVERETT HAGAN

Subscribed and sworn to before me this 26th day of October, 1945.

[Seal]

MACARIO V. BALLESTEROS

Notary Public in and for said
County and State.

Received copy of the within Affidavit this 29th day of Oct., 1945.

ELEANOR SHUR

Attorney for Petitioner

[Endorsed]: Filed Oct. 29, 1945. [46]

[Title of District Court and Cause.]

ORDER REQUIRING RESPONDENTS TO TESTIFY AND TO PRODUCE CERTAIN DOCUMENTS

This matter of the Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents having come on to be heard at 10 o'clock a.m., October 29, 1945, upon the verified application of Chester Bowles, Price Administrator, supported by exhibits and affidavits, and it appearing to the Court that respondents Jack Aros and Everett Hagan and each of them have failed and refused to appear to testify in the manner and at the time and place designated in the subpoenas duces tecum, duly issued by Chester Bowles as Price Administrator of the Office of Price Administration, on file herein, and it further appearing [47] that respondents Jack Aros and Everett Hagan and each of them have refused to and have not produced any of the documents and records described in said subpoenas duces tecum at the time and place designated therein or at any time or place in response to said subpoenas duces tecum,

served upon respondents and each of them on August 13, 1945,

It Is Hereby Ordered, Adjudged and Decreed that respondents Jack Aros and Everett Hagan and each of them appear at the Los Angeles District Office of the Office of Price Administration located at 1031 South Broadway, Los Angeles, California, before Eleanor Shur, Enforcement Attorney, at 10:00 a. m. on the 1st day of November 1945, to testify and to produce the following records:

All the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchase, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

If respondents and each of them make the above described records available for inspection and copying by an accredited representative of the Office of Price Administration at the place of business of respondents and each of them at 119-121 North Eastern Avenue, Los Angeles, California, on or before 4 o'clock p. m., October 31, 1945, and keep such records available during the ordinary business

hours of the day for so long as may be reasonably necessary for such inspection and copying, respondents [48] and each of them shall then be relieved of the obligation to produce such records at the Office of Price Administration at the time and place as above set forth.

Dated at Los Angeles, California, this 29th day of October, 1945.

BEN HARRISON

United States District Judge

Judgment entered Oct. 29, 1945. Docketed Oct. 29, 1945. Book C.O. 35, page 414. Edmund L. Smith, Clerk. By Murray E. Wire, Deputy.

[Endorsed]: Filed Oct. 29, 1945. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that J. A. Hagan, individually, and doing business as El Rey Cheese Co., and Jack Aros and Everett Hagan, respondents above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 29, 1945.

ABRAHAM GOTTFRIED
Attorney for Appellants

[Endorsed]: Filed Oct. 31, 1945. [50]

[Title of District Court and Cause.]

**DESIGNATION OF CONTENTS OF
RECORD ON APPEAL**

It Is Hereby Designated by Appellant that the following portions of the record proceedings and evidence be contained in the record on appeal:

- (1) Petition for an Order Requiring Respondents to Testify and Produce Certain Documents;
- (2) Order to Show Cause;
- (3) Memorandum of Points and Authorities in Support of Petition for an Order to Show Cause;
- (4) Affidavit of Eleanor Shur;
- (5) Reply of Respondents Jack Aros and Everett Hagan;
- (6) Affidavit of Jesus Aros;
- (7) Affidavit of Everett Hagan;
- (8) Transcript of proceedings of Monday, October 29, 1945. [51]
- (9) Order Requiring Respondents to Testify and Produce Certain Documents.

ABRAHAM GOTTFRIED
Attorney for Respondents

(Affidavit of service by mail attached.)

[Endorsed]: Filed Nov. 9, 1945. [52]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53, inclusive, contain full, true and correct copies of Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents; Affidavit of Eleanor Shur; Memorandum of Points and Authorities in Support of Petition for Order to Show Cause; Order to Show Cause; Reply of Respondents J. A. Hagan, etc., et al, to Order to Show Cause, etc.; Affidavit of Everett Hagan; Affidavit of Jesus Aros; Order Requiring Respondents to Testify and to Produce Certain Documents; Notice of Appeal; and Designation of Contents of Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on October 29, 1945, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 28th day of November, 1945.

[Seal] EDMUND L. SMITH,
Clerk

By THEODORE HOCKE
Chief Deputy Clerk

In the District Court of the United States in and
for the Southern District of California, Central
Division

Honorable Ben Harrison, Judge Presiding.

No. 4819-BH-Civil

CHESTER BOWLES, Administrator, Office of
Price Administration,
Plaintiff,
vs.

J. A. HAGAN, Individually, and doing business as
EL REY CHEESE CO., JACK AROS, and
EVERETT HAGAN,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Monday, October 29, 1945

Appearances: For the Plaintiff: H. Eugene Breitenbach, Wm. U. Handy and Eleanor Shur, 1031 South Broadway, Los Angeles, California. For the Defendant: Abraham Gottfried, 403 West Eighth Street, Los Angeles, California. [1*]

The Clerk: No. 4819 Civil, Chester Bowles vs. J. A. Hagan, individually, and doing business as El Rey Cheese Company, Jack Aros and Everett Hagan.

Miss Shur: If the Court please, we are in a

*Page numbering appearing at top of page of original Reporter's Transcript.

rather peculiar situation here this morning, and I think I will just present to the Court what happened and see what the Court thinks of it.

The affidavits of service or whatever document or record the Marshal keeps of service show that service of all documents was made on the respondents, Jack Aros and Everett Hagan, on October 15, although Judge McCormick had given us until the 17th to have all the documents served.

Now, no documents, no pleadings, no points and authorities, no affidavits were served on the petitioner until this morning when I appeared in court. Counsel for the respondents has had 14 days in which to prepare his documents and only served us this morning, and I don't feel that we should be called upon to have to argue the matter or that these documents which were served on us this late should be admitted on this argument.

If Judge McCormick had given the parties a short time in which to serve, or had imposed any sort of a burden upon respondents where they did not have a full 10 days in which to [2] answer to our points and authorities on this motion, I would not be quite so legalistic, but they had not only 10 but 14. There was no call put in to our office asking an extension of time or anything else, and I feel in the light of that the points and authorities, the reply of respondents, should not be considered at this time and that we should take judgment on our motion, and that the order should be issued.

The Court: Counsel, the rules require that they make some response, do they not?

Mr. Gottfried: Unless my understanding is incorrect, in a case where a memorandum of points and authorities is filed in support of a motion, there is a rule, if your Honor please, as I understand it, that the respondent should file counter points and authorities within five days of the hearing. But, in this particular case there is an order to show cause, naming this defendant as the defendant upon which to show cause.

Now, we have shown cause why the order should not issue in the form of affidavits, and could have brought the witnesses here personally to put them on the stand.

The Court: What is this all about?

Miss Shur: If the Court please, this is the situation. Under the Emergency Price Control Act the Administrator is given the right under Section 202(a) and Section 202(b) to require the inspection of any records which will assist in [3] prescribing regulations or which will assist in enforcement.

Under that Section 202, there is a further power given to the Administrator to issue a subpoena to obtain any of the records or documents which will assist him in the enforcement of the OPA regulations. Now, under that authority in May information had been brought to the Office of Price Administration that the respondents were in violation of certain regulations covering the sale of cheese, and in the normal course of business we sent investigators out to view the records. After all, in this type of violation of the statute or regulation you can't tell whether there is a violation unless you see the

sales records and records which determine prices, and therefore this type of thing comes squarely under Section 202(a) and Section 202(b). That was on May 21st. The records were refused.

I subsequently had a telephone conversation with one Mr. William Leavitt. When the records were refused, we then issued subpoenas from the Los Angeles district office under Order No. 53 wherein Chester Bowles has delegated to the district directors the right to issue subpoenas and the right to make inspection of records. That was issued, I believe, on June 9th or thereabouts.

The Court: Well, the records that are asked for here have a semi-public status?

Miss Shur: Yes, your Honor, those are the documents [4] which under a number of decisions have been held to have a quasi-public nature under this type regulation. That subpoena was issued by our district director on June 9, shortly after Mr. Leavitt, representing himself as the person served with the subpoena, called our office and stated he was not going to have the parties served answer to that subpoena.

I was then assigned the case and I called Mr. Leavitt to determine exactly what he had on his mind, and he stated that since this was not a subpoena signed by Chester Bowles himself with his own hand, that they would not answer that subpoena. As a matter of fact, at that time under the status of law, we could have asked the court for an order to show cause because under General Order 53 Chester Bowles has delegated his right to in-

spect the records and to issue subpoenas to the district office, and there is case law stating that it would be a ridiculous requirement to require a man in the position of Chester Bowles to put his signature on every single document.

The Court: The subpoena duces tecum has been served?

Miss Shur: That is correct.

The Court: And they have not responded to it, and that is the reason for these proceedings?

Miss Shur: That is correct, your Honor. However, we did actually get a Chester Bowles' signature.

The Court: What is your position? [5]

Mr. Gottfried: In the first place, if your Honor will please note, there are three respondents named in the petition, J. A. Hagan individually and doing business as El Rey Cheese Company, Jack Aros, and Everett Hagan. There has been no service made upon the man doing business, J. A. Hagan, by subpoena or by the order to show cause. The two people who were served appear by the very petition itself to be merely employees of J. A. Hagan.

Now, it is our contention that employees of a concern do not have the records under their custody and control and the records are not quasi-public insofar as they are concerned. The authority of Glick Bros. Lumber Company case holding the records to be quasi-public was this, and that is if a man wants to do business under certain regulations, he must comply with the record-keeping provisions

of those regulations, and to that extent they waive that portion of the immunity provision of the constitution because he has a choice of not doing business in that particular instance.

These people who are served, and for whom I am appearing here, are merely employees and no attempt has been made to serve the owner either under subpoena process or with the order to show cause and I think, if your Honor please, the provisions of the Emergency Price Control Act are directed towards the person who himself is engaged in business. These people are not engaged in business. I think that insofar as they are [6] concerned—

The Court: Your point is that they have failed to serve Mr. Hagan?

Mr. Gottfried: Yes.

Miss Shur: If the Court please, Mr. Gottfried is very well aware of the fact that J. A. Hagan, although he owns the business, resides, I think, in either Clifton or Morenci, Arizona. He does not operate the business. He has placed the business in the hands of his brother, Everett Hagan, and Jack Aros.

Mr. Gottfried is also aware of the fact that these two gentlemen between them are bookkeeper and manager of that business and there would be no purpose in serving Mr. J. A. Hagan because the records and everything are under the management and control of these two gentlemen.

The Court: I am going to issue an order that

the two parties—what day do you want them to appear?

Miss Shur: Any day other than the 31st of October will be agreeable.

The Court: How about the 1st of November?

Miss Shur: That would be fine.

The Court: I am going to issue an order to appear on November 1st at 10:00 o'clock at the Office of Price Administration in Los Angeles, California, to testify and produce the documents in answer to the subpoena duces tecum attached [7] to the petition. We will try it out. If they don't appear, then we can try it out on contempt.

Mr. Gottfried: May I have a stay of execution, if your Honor please, for this reason. I wish to serve oral notice of appeal at this particular time.

The Court: I am not going to grant a stay of execution. If they don't appear, we will cite them for contempt and if I find them in contempt and send them to jail, you can get out a writ of habeas corpus.

Mr. Gottfried: I just want to clarify a question of law, if I may. The appeal court has held that the order your Honor has just made is a final order and one which is appealable; that it is improper to test it by placing the defendants in contempt, but the proper time to test it is after the order is made and before the parties are placed in contempt. I cite your Honor authority—

The Court: Well, counsel knows fully well that before any appeal could be determined on this, it will be moot and the purpose of it will be destroyed.

Now, this court is not going to grant a stay of execution. If the Circuit Court desires to make ineffective the Price Administrator by granting a stay of execution, that is its privilege, but this court is not going to be a party to it. If they don't appear at that time, unless the Circuit Court intervenes in the meantime, then somebody is going to jail and you can try it out. [8]

Mr. Gottfried: If the court please, is it not a correct statement of law that the appeal automatically stays the order?

The Court: I don't know whether it does or not.

Mr. Gottfried: That wasn't what—

The Court: I am not going to cross that bridge until I come to it, but I will say now, so counsel will know, that I haven't any sympathy for an officer of this court that attempts to interfere with the proper administration of war measures. I want you to know that.

Mr. Gottfried: If your Honor please, the question of materiality which we have raised at that particular time has not been gone into by the court.

The Court: I have gone into the government's statement here that these men are in charge of the business and in possession of these records; that the owner lives without the jurisdiction of this court. Therefore, this court would be helpless to do anything and the OPA would be helpless.

Now, I don't think that the law is going to sanction those things. It may be. It may be that you can get away with it. Maybe you can get some satisfaction out of interfering and advising your clients to

ignore these subpoenas. Maybe the money you will make out of it will create considerable satisfaction in your own mind, but to me one that helps to interfere with measures that help to make it possible for [9] these men to live and exist and have freedom, I wouldn't be happy about it.

Mr. Gottfried: Well, if your Honor please, I think your Honor is mistaken on several points, if I may respectfully say so. One is that there was no lack of appearance. We did appear. Secondly, we are questioning the materiality of evidence which they desire, which we have a right to question, and the authorities we have cited have held that it is necessary to the proof to make orders to show cause show materiality of evidence. Of course, if we are convicted without a hearing on the ground that the OPA issues a subpoena which may not be valid itself, we must remove all constitutional protections we have. Of course, that is a different proposition, but in this particular case there is no showing of materiality whatever.

The Court: Just a moment, counsel. If there are any questions there that they don't want to answer because they hold they are immaterial and those questions are brought into this court as to whether they are material or not, then I will pass on the materiality.

I had another case, not under the OPA, but we had that very question and the party refused to answer certain questions. Then they were brought into court to show cause why they should not be punished for contempt and the questions were gone over and

the court made an order at that time for [10] certain questions to be answered and other questions it said did not have to be answered.

If there are questions there that are asked which tend to incriminate and the witness refuses to testify on that ground, then they can cite them in for contempt before this court and I will determine at that time whether they should answer or not, and if they are incriminating, of course I will not require them to answer.

Mr. Gottfried: Well, all I can do, your Honor, in preparing for this order to show cause is go by the cases as they have come down.

The Court: You people probably know more about the procedure than I do. I know that the Congress of the United States has provided for the issuance of subpoenas. The subpoenas have been served and the parties have not responded.

Mr. Gottfried: If your Honor please, we did respond and responded at the time questioning the validity and materiality. If your Honor will look at the subpoena, it says "produce records, etc." How can we determine what is meant by the "etc."?

The Court: I don't think there is any question about what is meant by that.

Mr. Gottfried: I think I would just like to call your Honor's attention to the case of *Bowles v. Cherokee Textile Mills* in which an exactly similar situation was involved and [11] presented in this same manner. In that case the question also came up as to what Congress intended. The Office of Price Administration took the position that just

because they asked for the information that made it material and the court could not require on the order to show cause, not after hearing was held, as to whether that was material.

The court stated:

"I think that Congress did not so intend, for if such determination is not subject to judicial review the statute would so ignore the constitutional safeguards as to render the provision invalid. It is argued that the language of Section 202(a) of the Emergency Price Control Act of 1942 leaves no doubt of the congressional intent to vest in the Administrator the exclusive right to determine the question of materiality or evidential value. The statute provides, Section 202(a), 50 USCA Appendix, Section 922: 'The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders and price schedules [12] thereunder . . .'

"It is my opinion, after considering the cases cited by counsel which bear upon the question, that it was squarely before the Circuit Court of Appeals for the Sixth Circuit in *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 Fed (2d) 450, at 453, in which the court said, in part: 'The statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus

confided to the discretion of the District Court, which is to be judicially exercised. We think that the review in this case extends no further than the determination as to whether or not there was an abuse of its discretion. Applying this rule, we think that it was open to the company to contend that the documents called for do not relate to the particular matter in question; that this contention made in the answer raises an issue of fact for determination by the court, and if determined in its favor that the application of the Board as to documents found not so to relate should be dismissed upon the merits.' "

The Court goes on to say: [13]

"It is true that the statute here involved uses language broad enough to authorize the court to compel production of documents, etc., whether of evidential value or not, but I cannot assume, as said in the American Tobacco Co. case, 264 US at 305, 'that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 US 447, 479) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent.' "

The Court goes on to state:

"Before the courts are permitted to strike down enactments of the Congress upon the idea that the

Congress intended to compel a citizen to do that which the Constitution says he may not be required to do, the language used in the statute must be so clear and specific as to permit no other reasonable construction consistent with organic law. I believe the language here used may be reasonably construed [14] to relate to documents and to testimony with respect to matters material to a determination of the question under investigation, that is, the price at which a certain commodity shall be sold. My conclusion is that the court has jurisdiction to determine the question whether the matter called for in the subpoena is material to the determination the Administrator is authorized to make, but before the aid sought by the administrator will be granted, it must appear from evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. I think this action will dispose of the motion to strike portions of the answer, since the narrow question is whether the administrator is given sole authority to determine relevancy and materiality. I do not think the Congress so intended.

“An order may be prepared for approval and entry denying the relief sought until it shall appear from evidence that the court, in the exercise of sound judicial discretion, should require the production of the evidence sought, because the same is material to the determination the administrator is authorized to make.” [15]

Then, going on to the case of Bowles v. Beatrice

Creamery Company, 146 Fed. (2d) 774, Tenth Circuit Court of Appeals decision, the court specifically stated that the way to test validity of subpoena is by refusing to answer the subpoena and bringing it into court for that purpose. The court in that particular case did not state that the defendants were interfering with the functioning of war measures, but stated as follows:

“There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason impose in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto.”

Now, I have cited these cases merely for the purpose of [16] showing that it is not an unheard of thing to take advantage of our constitutional rights.

The Court: I am not trying to interfere with your constitutional rights. My course of procedure is this, and is one that this court has heretofore followed. I am going to require them to respond to the subpoena.

Mr. Gottfried: Well, if I understood what your Honor's practice was, I certainly would have followed it.

The Court: And then if there are any questions that are asked that tend to incriminate or any other question you feel they should not answer, you can advise your clients not to answer and then it would be brought into this court in a sense just like a deposition, and the court will pass upon whether it is a material question or tends to incriminate. That is the procedure I expect to follow.

I will say frankly that this court will not require them to answer any questions that tend to incriminate. I want to state, Miss Shur may know, I am very much in accord with Judge St. Sure's opinion.

Miss Shur: If the court please, I think you will note reading our subpoena there certainly was nothing there that would tend to be incriminating. We merely ask, first, for the records covering the base period which would determine the price of this commodity. We ask next for the sales records and purchase records from the time of our subpoena to a year [17] ago in retrospect because we have a one-year statute of limitations and could not bring any—

The Court: You prepare your order and then when the questions come up, why, if they do not answer the questions we will hear it then on the questions raised by counsel. I want you to know that I am in accord, I was not at the beginning, but after further study and thought I am in ac-

cord with Judge St. Sure's opinion and I don't feel that you can compel anybody to furnish information upon which you can impose a penalty.

Miss Shur: If the court please, I don't think that was the purpose of this investigation.

The Court: The only thing is that if it is a fishing expedition to determine whether you can impose treble damages, this court will not require them to answer the questions.

Miss Shur: If the court please, any treble damages that would result would not be brought against the people who had custody and control of the books. It would lodge against the person who owned the business.

The Court: Well, that is something we will cross when we come to it.

Mr. Gottfried: I wish to state for the record that the purpose of bringing the proceedings up in this particular manner was merely because that was the method outlined by the cases which I have cited, not being familiar with your Honor's [18] procedure.

The Court: You may be correct as to the proper procedure, but this court feels that when a person does not respond to a subpoena and ignores it—

Mr. Gottfried: I did respond, your Honor. I appeared at the subpoena hearing. I am sorry that the matter was presented as it was, as vague as it was. I won't take any more of the court's time, but I should like to clarify our position in this matter.

Your Honor will recall that V-J Day was declared to be a holiday and unknowing to the gov-

ernment was set for that particular hearing. Now, what the status of that legal holiday was still remains to be clarified. There have been lots of disputes about it, but Miss Shur called me up at my home on V-J Day and said that despite the fact that everybody else would be off and the office would be closed, she would be present and expected us to have our clients there.

The Court: She was getting ready for that honeymoon.

Mr. Gottfried: I know that I questioned the validity of the subpoenas and I know I questioned the materiality of the information they wanted. I told Miss Shur that we had discussed the entire matter with the price section and that the price section had approved our action and if she would consult with them it would shorten the entire matter. I told her that I didn't know if I could get in touch with my clients. I [19] tried but was unable to do so. I appeared, however, and made our claims as to the validity of the subpoena and the materiality of the information.

No recommendation was made by the OPA immediately, but the first thing we knew we had this order to show cause to face. Now, if we questioned the materiality of the evidence then, naturally we had to follow up with this order to show cause and question it before your Honor. Now, if I had known that your Honor would rather have had us make the record on subpoena and then have it brought up on order to show cause as to whether certain questions should be answered, I certainly would

have done it that way rather than incurring a lecture from your Honor. I certainly did not invite or enjoy it. Now, that is the way the matter came up.

The Court: I will say this, that if an objection is made to a question and the question is not answered, the court will then give the party an opportunity to answer those questions, and that is all I can do. It is objected to and all I can do is counsel them to answer the questions. That is as far as I can go, and, of course, if the questions are immaterial or tend to incriminate and violate the constitutional rights, why, of course, this court is not going to make them answer.

Miss Shur: Well, if the court please, this is a matter that has had a rather long history with our office and certainly [20] we have no intention of asking any questions that are going to be incriminatory. Our sole purpose is to see the sales records of this company which, under the Act, we are entitled to do. However, not only our office, but other offices of the Office of Price Administration have been refused any access whatsoever or at all to its records. Now, frankly I think that is a distinct flouting of law whether with or without legal advice.

There is a long line of case history which will show that we have a right to inspect those records; that there is no violation of the constitution when we do see those records. The records specifically requested by the Emergency Price Control Act and by regulations that cover these sales of cheese—

The Court: Well, we will handle it that way.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5 day of November A. D., 1945.

MYRTLE SANALLACH,
Official Reporter

[Endorsed]: Filed Nov. 9, 1945.

[Endorsed]: No. 11197. United States Circuit Court of Appeals for the Ninth Circuit. J. A. Hagen, individually, and doing business as El Rey Cheese Co., Jack Aros and Everett Hagan, Appellants, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 29, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 11197

J. A. HAGAN, individually, and doing business as EL REY CHEESE CO.; JACK AROS and EVERETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellants respectfully state that the points upon which they intend to rely on appeal are as follows:

1. That the Court below erred in refusing to require the Appellee to prove service of the Order to Show Cause upon the Appellants, or upon all the Respondents in the proceeding.
2. That the Court below erred in refusing to hear any evidence on the question of the validity of the execution and issuance of the subpoenas.
3. That the Court below failed to require the Appellee to prove the relevancy or materiality of the books, papers, documents and testimony re-

ferred to in the said subpoenas, and that the Order of the Court below was made without a scintilla of proof of the said materiality and relevancy.

4. That the Court below erred in not requiring the Appellee to show which commodity was being investigated by it, or which of the regulations issued by the Office of Price Administration governed the sale of said commodity.

5. The Court below held that the Appellants had failed to answer and appear at the time and place called for in said subpoenas; and that the Court below should have held that there was no failure on the part of the Respondents to appear at the time and place called for in the subpoenas.

6. That the said subpoenas were inadequate in that the Appellants should not be forced to guess as to what is meant by the letters "etc." appearing therein.

7. That the said subpoenas constitute an unreasonable search and seizure contrary to the 4th Amendment of the Constitution of the United States.

8. That the said subpoenas violated Appellants' right against self-incrimination contrary to the 5th Amendment of the Constitution of the United States.

9. That Appellants are merely employees and that the documents referred to in said subpoenas are not within the custody or control of Appellants

within the meaning of the applicable law and regulations.

Dated: Los Angeles, California, November 27, 1945.

ABRAHAM GOTTFRIED
Attorney for Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants respectfully state that the entire certified record will be necessary for the consideration of the points on which appellants intend to rely on appeal and, therefore, designate the entire record as certified by the Clerk of the United States District Court for the purposes of paragraph 6 of Rule 19.

Dated: Los Angeles, California, December 19, 1945.

ABRAHAM GOTTFRIED
Attorney for Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 22, 1945. Paul P. O'Brien, Clerk.

No. 11197.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. A. HAGEN, individually, and doing business as El Rey
Cheese Co., JACK AROS and EVERETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Ad-
ministration,

Appellee.

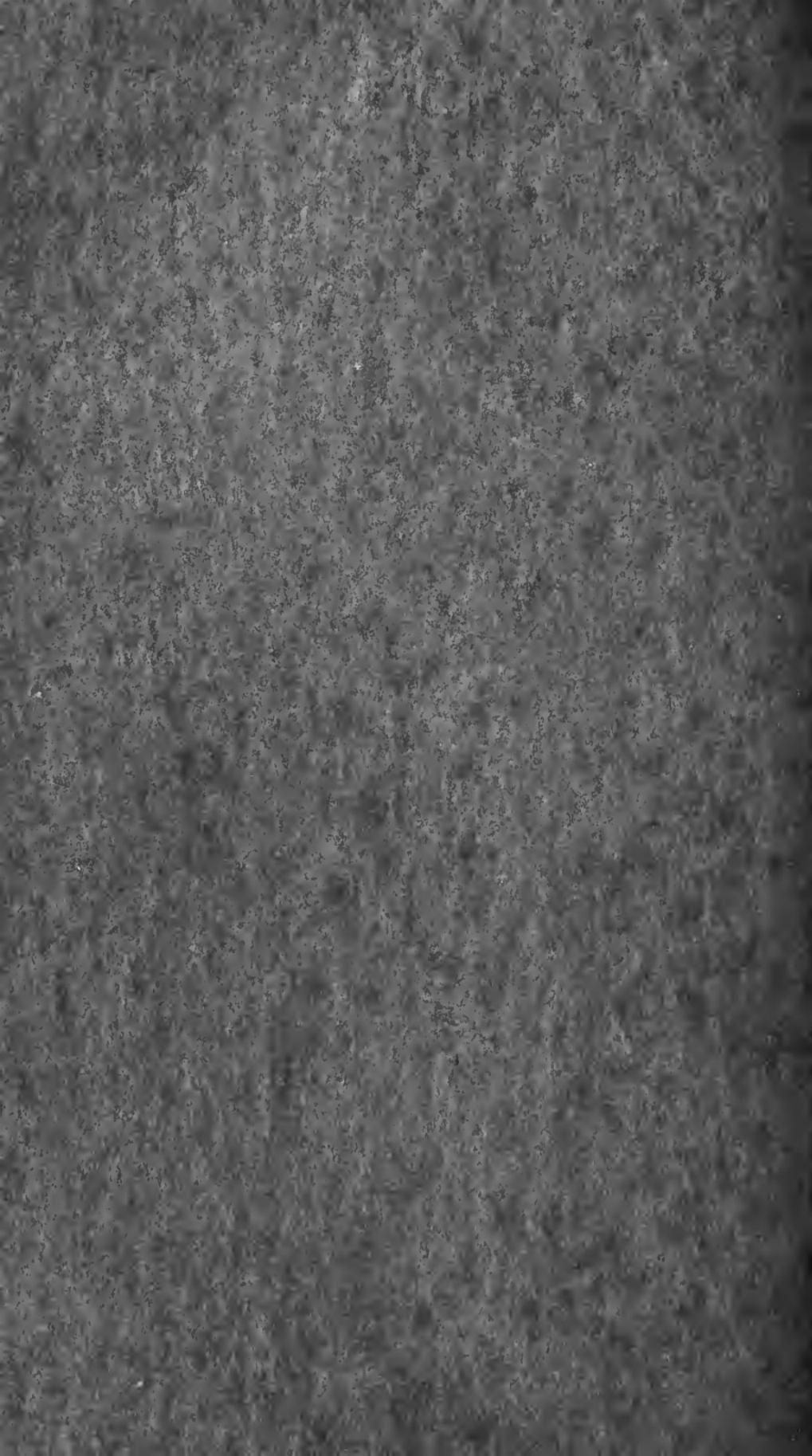
APPELLANTS' OPENING BRIEF.

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No. 11197.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Cheese Co., JACK AROS and EVERETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Ad-
ministration,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement Showing Jurisdiction.

Chester Bowles, Administrator of the Office of Price Administration, hereinafter called Appellee, brought this proceeding on behalf of the United States of America, pursuant to the provisions of Sections 205(a) and 202(e) of the Emergency Price Control Act of 1942. (Pub. L. 421, 77th Cong., 2nd Sess.; 56th Stat. 23; U. S. C. A., Title 50 App., Sections 901-946), as amended (Pub. L. 383, 78th Cong., 2nd Sess.; Pub. L. 108, 79th Cong., 1st Sess.) hereinafter called the "Act," for an order requiring Appellants, and each of them, to testify and produce certain documents described in the subpoenas *duces tecum*, more fully hereinafter set forth. [Tr. 2.]

On October 29, 1945, the court issued an Order requiring Appellants Jack Aros and Everett Hagan to testify and produce certain documents. [Tr. 35, 36, 37.] Said Order was entered and docketed October 29, 1945. [Tr. 37.]

Jurisdiction of this proceeding was conferred upon the District Court by Section 202(e) of the Act, it having been alleged that Appellants, and each of them, had failed and refused to appear for the purpose of testifying in response to said subpoenas, and further that said Appellants had failed and refused to produce any of the documents and records described in said subpoenas at the time and place designated therein, [Tr. 7.]

Notice of Appeal was filed by J. A. Hagan, Jack Aros, and Everett Hagan on October 31, 1945, and within thirty days from the making of said Order. [Tr. 37.]

The United States Circuit Court of Appeals has Appellate jurisdiction of the above Order by virtue of Section 128(a) of the Judicial Code as amended February 13, 1925, effective May 13, 1925 (43 Stat. L. 936, U. S C. A., Sec. 225).

Statement of the Case.

The within proceeding was brought by Appellee for an Order requiring Appellants to testify and produce certain documents described in the subpoenas referred to as "Exhibit A," directed to Appellants Everett Hagan, Jack Aros and El Rey Cheese Co., and purportedly issued by John O'Conor, Acting District Director of the Office of Price Administration [Tr. 10], and "Exhibit B" and "Exhibit C" directed to Jack Aros and Everett Hagan, respectively, purportedly issued by Chester Bowles as Administrator of the Office of Price Administration. [Tr. 11, 12, 13, 14.]

Appellee's petition, which was filed October 10, 1945, alleges that Appellant, J. A. Hagan, at all times mentioned therein was doing business as El Rey Cheese Co., and that Jack Aros was the bookkeeper, agent, employee and attorney-in-fact of said J. A. Hagan, and that Everett Hagan was the manager, agent and employee of the said J. A. Hagan [Tr. 2, 3]; that the said Appellants were and now are engaged in the business of selling at wholesale various types of cheeses subject to the provisions of Maximum Price Regulation 280, as amended, effective December 3, 1942 (7 F. R. 10144), Revised Maximum Price Regulation 289, as amended, effective May 17, 1944 (9 F. R. 5140), and the General Maximum Price Regulation (7 F. R. 3330) [Tr. 3]; that on or about May 24, 1945, Appellee deemed that an investigation was necessary to determine if there was evidence that Appellants had complied with the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) as amended (Pub. L. 383, 78th Cong., 2d Sess.; Pub. L. 108, 79th Cong., 1st Sess.) hereinafter called the "*Act*," and to assist in its administration and enforcement and the regulations thereunder; that in conducting said investigation Appellee deemed it necessary to inspect Appellants' records allegedly required to be kept under the provisions of Section 1351.812 of MPR 280, as amended (7 F. R. 10144), Section 1351.807 of Temporary MPR 22, as amended (7 F. R. 7914), and Section 5 of MPR 289, as amended (9 F. R. 5140), and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations. [Tr. 4, 5.]

Said petition further alleged that on June 9, 1945, a subpoena was signed and issued by John O'Conor, Acting

District Director of the Los Angeles District Office of the Office of Price Administration, which was allegedly served only upon Appellants Jack Aros and Everett Hagan, but not upon Appellant J. A. Hagan [Tr. 5, 6], to which Appellants Jack Aros and Everett Hagan failed to respond; that on August 2, 1945, a subpoena was purportedly signed and issued by Chester Bowles, as Administrator [Tr. 9], which was served only on said Appellants Jack Aros and Everett Hagan [Tr. 7], to which said Appellants failed to respond; that the testimony of said Appellants and all of said documents were and are relevant and material to the said investigation [Tr. 8], and that said documents are under the control of said Appellants Jack Aros and Everett Hagan. [Tr. 8.]

It appears from the affidavit of Merle B. Swan that the subpoenas purportedly signed by Chester Bowles [Exhibits "B" and "C"] were not served on Appellants Jack Aros and Everett Hagan until August 13, 1945, and that said subpoenas required said Appellants to appear in response thereto on August 16, 1945, at 9:00 a. m. of said day. [Tr. 15.]

Appellee prayed:

- (1) For an order to show cause why an Order requiring Appellants to appear and testify and produce said documents should not issue, and
- (2) That the Court issue its Order requiring Appellants to appear and testify and produce the documents described in said subpoenas. [Tr. 9.]

The court issued its Order to Show Cause on October 10, 1945 [Tr. 22, 23], requiring the Appellants and each of them to appear in the United States District Court on October 29, 1945 at 10:00 a. m., to show cause why

an Order should not issue requiring Appellants and each of them to appear before an officer of the Office of Price Administration to testify and produce the documents described in said subpoenas *duces tecum*.

Appellants Jack Aros and Everett Hagan had appeared specially through their attorney on the said August 16, 1945, for the purpose of quashing the issuance and service of said subpoenas. [Tr. 21, 22.]

Appellants on October 29, 1945, filed their reply to the said Order to Show Cause. [Tr. 26.] Said reply was supported by the affidavits of Jesus Aros, referred to in said subpoenas as Jack Aros [Tr. 26], and Everett Hagan [Tr. 31], denying upon information and belief the allegations of the petition and alleging affirmatively that said affiants were unable to ascertain the documents required to be produced [Tr. 27, 32], and that said documents were in the possession and under the control of J. A. Hagan, doing business as El Rey Cheese Co. [Tr. 30, 34.]

The questions involved, and which were raised in Appellants' Reply and upon the hearing of the Order to Show Cause, are as follows:

- (1) The effect of the failure of the Appellee to produce evidence of materiality and relevancy of the testimony sought to be elicited and of the documents sought to be produced;
- (2) The right of the Appellants to test the validity of the subpoenas upon the hearing of the Order to Show Cause before being subjected to contempt proceedings;
- (3) The right of the Administrator to require employees to produce books of their employer;

- (4) Whether the court was justified in holding that there had been no appearance in response to the said subpoenas;
- (5) Whether the subpoenas described the documents sought to be produced with the definiteness and certainty required by law;
- (6) Whether said subpoenas were reasonable, and
- (7) Whether the rights of Appellants under the 4th and 5th Amendments of the Constitution of the United States were violated.

The court issued its Order dated October 29, 1945, directing Appellants Jack Aros and Everett Hagan to appear at the Los Angeles District Office of the Office of Price Administration, located at 1031 South Broadway, Los Angeles, California, before Eleanor Shur, Enforcement Attorney, at 10:00 a. m., on the first day of November, 1945, to testify and to produce all of the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, and from June 15, 1944, to and including July 28, 1944, covering purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor Maid Gruyere Type Swiss Cheese. [Tr. 35, 36; 37.]

The said Order refers only to the subpoenas issued by Chester Bowles [Tr. 35], and makes no finding or order with reference to the subpoena issued by John O'Conor, referred to as Exhibit "A." [Tr. 10.] Therefore, it must be assumed that the Order purports to compel the Ap-

pellants to comply only with the subpoenas issued by Chester Bowles and referred to as Exhibits "B" and "C" [Tr. 11, 12, 13, 14], and that all questions with reference to the subpoena issued by the said John O'Conor have become moot.

Specifications of Error.

The court erred in the following particulars:

- (1) In issuing its Order where there was no showing of relevancy or materiality of the documents sought to be produced.
- (2) In not requiring the Appellee to produce evidence of the relevancy and materiality of the documents described in the subpoenas.
- (3) In refusing to hear evidence as to the validity of the subpoenas.
- (4) In not holding that the subpoenas were uncertain, indefinite and unreasonable.
- (5) In holding that Appellants had failed and refused to appear and testify in response to said subpoenas.
- (6) In refusing to require the service on J. A. Hagan of the subpoenas and Order to Show Cause before issuing its Order.
- (7) In issuing its Order in violation of the 4th Amendment of the Constitution of the United States.
- (8) In issuing its Order in violation of the 5th Amendment of the Constitution.

ARGUMENT.

I.

There Was No Showing of the Relevancy or Materiality of the Evidence or Documents Sought by the Subpoenas.

Nowhere in the petition or in the subpoenas do any facts appear showing the relevancy or materiality of the testimony or documents required by the subpoenas.

In his petition Appellee alleged solely that an investigation was deemed necessary to determine "if" there was evidence that Appellants had complied with the provisions of the Act. [Tr. 4.] As his conclusion, but without alleging any facts, Appellee then alleged in paragraph 5 of his petition, that it was necessary in conducting said investigation to obtain such information from certain records of Appellants. [Tr. 4, 5.] However, Appellee does not directly or even by implication allege that any violation had been committed by Appellants, nor does he show how or in what manner the said records are relevant or material to any investigation permitted by law, but rests his demand upon the sole ground that he deemed "an" investigation necessary to determine "if" there was evidence.

Upon the hearing of the Order to Show Cause counsel for Appellee volunteered the statement, unsupported by any evidence or proof, or any allegation in the petition, that in May information had been brought to the OPA that Appellants "were in violation of '*certain*' regulations covering the sale of cheese," without in any manner stating what the violation consisted of or what regulation was violated. [Tr. 42, 43.] (Emphasis ours.) This statement, in so far as Appellants can determine, is the

only inkling that appears that any violation by Appellants, if any, was even suspected, and even this statement is so vague and indefinite as not to have conveyed any meaning either to the court or counsel. It certainly did not seem sufficiently substantial to Appellee to make such an allegation in his petition or in said subpoenas.

In other words, Appellee has frankly conceded that he intended to conduct a general search and "fishing expedition." No ground was shown for supposing the documents called for contained evidence relevant to any inquiry, nor was there any statement, either in the petition or in the subpoenas, stating the subject of any inquiry.

In *United States v. Davis* (C. C. A. 2), 151 F. (2d) 140, it is stated:

"We are very clear that to continue in a business after it has been regulated * * * does not expose a dealer to any general search."

In the case of *Goodyear Tire and Rubber Company v. National Labor Relations Board*, 122 F. (2d) 450, the Circuit Court of Appeals stated:

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. . . . We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable."

Again in *Bowles v. Beatrice Creamery Company* (C. C. A. 10), 146 F. (2d) 774, the Circuit Court of Appeals, in reviewing the requirements of an administrative subpoena, held:

“There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason impose in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto.”

In the case of *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, the court held as follows:

“Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the

possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The District Court of Tennessee in the case of *Bowles v. Cherokee Textile Mills et al.*, 61 F. Supp. 584, denied an order enforcing an Administrative subpoena, basing its decision on the *Goodyear Tire and Rubber Company* and the *American Tobacco Company* cases (*supra*), even though, as the court stated, the Emergency Price Control Act uses language broad enough to authorize the court to compel production of documents, etc., whether of evidential value or not.

Appellee, by way of recital in his petition and as his conclusion, referred to three regulations under which Appellant J. A. Hagan was required to keep records. [Tr. 5.] However, there was no direct allegation in said petition that the sales of the commodities involved, to wit, Swiss Gruyere Type Cheese or Taylor Maid Gruyere Type Swiss Cheese, came under the said regulations or any of them. Unless the said commodities came under said regulations, the records required to be kept thereunder were immaterial and irrelevant and, further, said Appellant was not required to keep such records.

Further, each of said regulations covers sales of a different commodity and requires different records, and Appellee was required to specify in his petition the regulation under which the records were required to be kept.

Before Appellee can require the production of records he must show that the Appellants' sales are subject to some regulation and that certain records are required to be kept under such regulation. Further, the court may not make an order enforcing a subpoena until it has ascertained that the Respondents' sales are subject to some regulation, and only then with respect to the records pertaining thereto.

A mere recital in Appellee's petition is insufficient to determine the relevancy of the records required to be produced where Appellee does not allege that Appellants' sales come within the provisions of a regulation.

Manifestly, the sales of the cheese referred to in the subpoenas do not come within the provisions of three regulations. Section 1351.812 of MPR 280, for instance, does not require the purchaser to keep records of purchases, while Section 5(b) of MPR 289 does require the purchaser of commodities coming within its provisions to preserve original invoices of such purchases.

Obviously, if the sales by Appellant J. A. Hagan come within the provisions of Section 1351.812 of MPR 280, documents required by said subpoenas covering *purchases* of the commodities described therein are immaterial and irrelevant.

II.

Where the Person Directed by an Administrative Subpoena to Produce Books, Papers or Documents Contends That Such Papers Are Not Relevant to the Investigation the Administrative Agency Must Produce Some Evidence of Relevancy or Materiality Before the Subpoena Will Be Enforced.

Petitioner alleged generally in paragraph 11 of his petition that all of the documents described in the subpoenas and required to be produced are now, and at the time of the issuance of said subpoenas, were relevant and material to said investigation, without any allegation as to how the said documents are or were relevant or material. [Tr. 7.] This allegation was denied by Appellants in paragraph III of their reply. [Tr. 25.]

Appellants also raised the question of the materiality and relevancy of the said documents before the court. [Tr. 47.] The court, however, refused to hear such evidence, stating that it would issue the Order [Tr. 46], and that the question of materiality would not be considered until Appellants were cited for contempt. [Tr. 48, 53, 54.] It would appear from the above proceedings that the court was of the opinion that the Administrator was the sole judge of the materiality and relevancy of the documents sought to be produced and that the court had no jurisdiction to review the administrative determination of said materiality or relevancy.

The issuance of an administrative subpoena does not require the District Court to issue an order enforcing

compliance therewith, but simply gives it jurisdiction to issue. The enforcement of the subpoena is confined to the discretion of the District Court which is to be judicially exercised. *Goodyear Tire and Rubber Company v. National Labor Relations Board* (*supra*); *Bowles v. Cherokee Textile Mills* (*supra*); *Hale v. Henkel*, 201 U. S. 43, 77.

In the case of an application to the court for an order enforcing a subpoena issued by the Administrator, the person to whom the order or subpoena is directed has full opportunity to test its validity. 42 Am. Jur. 419; *Goodyear Tire and Rubber Company v. National Labor Relations Board* (*supra*).

The validity or legality of an Administrator's subpoena may be challenged by the person to whom such process is addressed before being compelled to respond thereto. *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774.

It was open to the Appellants to contend that the documents called for had no relation to the particular matter in question and this contention made in the answer raises an issue of fact for determination by the court (*Goodyear Tire and Rubber Company v. National Labor Relations Board* (*supra*)); and before the aid sought by the Administrator will be granted, it must appear from the evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. *Goodyear Tire and Rubber Company v. National Labor Relations Board* (*supra*); *Federal Trade*

Commission v. American Tobacco Company (supra); Bowles v. Cherokee Textile Mills et al. (supra).

The general averment in paragraph 11 of the petition of the Administrator [Tr. 7], that the documents required to be produced are relevant and material to the said investigation, is not sufficient. *Dancell v. Goodyear Shoe Machinery Co.* (C. C., Mass.), 128 Fed. 753; 18 C. J. 1124, 1125. But the Administrator must allege the facts that will enable the court to determine that they are *prima facie* material and relevant. *United States v. Terminal Railway Assoc.*, 154 Fed. 268.

Further, the burden of proof is on the Administrator to prove the relevancy of the documents sought to be produced, but no attempt was made by the Administrator to discharge this burden. In the *Goodyear* case (*supra*) the respondent company claimed that a card index sought to be produced was irrelevant. The court stated as follows:

“We think that with reference to the card index the rule laid down in the American Tobacco Company case also applies, that if the company’s conclusion that this index is not relevant is not final, at least some evidence must be offered to show that it is wrong. *This evidence obviously * * * must be produced by the Board.*” (Emphasis ours.)

We advert to the statement made by counsel for the Appellee as to her information concerning violations by Appellants [Tr. 42], and we wish to point out that the so-called investigation then pending was based solely on hearsay and suspicion. No complaint or proceeding was

then pending involving Appellants. In the case of *Federal Trade Commission v. American Tobacco Company (supra)* the court held:

“The argument for the government attaches some force to the investigations and proceedings upon which the commission had entered. The investigations and complaints seem to have been *only on hearsay or suspicion*; but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the 4th Amendment, or even to come so near to doing so as to raise a serious question of constitutional law. United States *ex rel.* Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854.” (Emphasis ours.)

Therefore, Appellants respectfully submit that the court abused its discretion:

- (a) In refusing to consider any facts with reference to the legality and validity of the Administrator’s subpoenas;
- (b) In refusing to give Appellants a full opportunity to test the legality and validity of said subpoenas;
- (c) In holding that the Appellants were obligated to respond to the Administrator’s subpoenas before challenging their legality and validity;
- (d) In not requiring the Appellee to produce evidence showing the materiality and relevancy of the documents sought to be produced.

III.

**The Court Below Erred in Refusing to Hear Evidence
as to the Validity of the Execution of the Sub-
poenas.**

Appellants raised the question as to the validity and authenticity of the subpoenas at the time their counsel appeared specially before the District Office of the Office of Price Administration on August 16, 1945. [Tr. 21.] Appellants again raised this question in their Reply. [Tr. 24.]

No evidence was permitted by the court below for the purpose of testing the validity of said subpoenas.

In the case of an application to the court for an order enforcing a subpoena issued by the Administrator, the person to whom the order or subpoena is directed has full opportunity to test its validity. *42 Am. Jur.* 419; *Good-year Tire and Rubber Company v. National Labor Relations Board* (*supra*).

The validity or legality of an Administrator's subpoena may be challenged by the person to whom such process is addressed before being compelled to respondent thereto. *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774.

IV.

That Said Subpoenas Were Uncertain, Indefinite and Unreasonable.

The subpoenas were general and sweeping in character and all-inclusive in their terms and could have described every book or document used in the business of Appellants whether the same applied to the transaction or transactions, if any, sought to be investigated or to transactions of said Appellants entirely irrelevant and immaterial thereto. How or in what manner the word "etc." could be interpreted or what books or documents referred to the purchases, sales and deliveries of the various types of cheese, or how any of the said books or documents referred to any investigation then in contemplation could not be ascertained. [Tr. 11, 12, 13, 14.]

It was not incumbent upon Appellants to speculate as to which records were required by Appellee, as the word "etc." could have covered not only sales records, but records of every description. Probably, if Appellee had divulged what investigation of Appellants was contemplated, they might have guessed what documents were sought, but no such disclosure was ever made.

Counsel for Appellee stated that the "sole purpose (of the Office of Price Administration) is to see the sales records of this company." [Tr. 57.] Therefore, the subpoenas should have been limited to such records naming them, but it is plainly apparent that the sole purpose of using the subpoenas was to conduct a fishing expedition with the hope of uncovering a violation.

To justify an order for the production and inspection of books or papers, the books or papers should be specified with reasonable certainty. 17 Am. Jur. 33; *Bowles v. Abendroth* (C. C. A. 9), 151 F. (2d) 407; *Bank of America etc. v. Douglas*, 105 F. (2d) 100; *Bowles v. Beatrice Creamery Co. (supra)*.

V.

That the Court Erred in Holding That Appellants Had Failed to Answer and Appear at the Time and Place Called for in Said Subpoenas.

The court found that each of the said Appellants, Jack Aros and Everett Hagan, had failed and refused to appear and testify [Tr. 35] in response to the subpoenas duly issued by Chester Bowles.

Section 202(e) of the Act provides that the District Court shall have jurisdiction to issue an order requiring a person to appear and give testimony, and to appear and produce documents or both in case of contumacy by, or refusal to obey a subpoena served upon any such person.

There was no showing whatsoever of such contumacy or refusal on the part of the Appellants, but it affirmatively appears in the record that said Appellants appeared by their attorney for the purpose of resisting the subpoena upon legal and sufficient grounds. [Tr. 20, 21, 22.]

Therefore, the court had no jurisdiction to issue its Order herein appealed from in the absence of such showing of contumacy or refusal, and the court should have held that said Appellants had appeared at the time and place called for in said subpoenas and should have directed Appellee to issue legal and valid subpoenas obviating the defects of the subpoenas herein involved.

In view of the refusal of the court to consider the objections taken at the time that Appellants responded to the subpoenas and objected thereto, it was an abuse of discretion by the court not to have called for the introduction of evidence to determine whether the objections made by the said Appellants were valid or because of their contumacy or refusal to obey said subpoenas, and thereafter in its Order to have made proper findings or recitals of the facts found.

VI.

The Court Below Erred in Refusing to Require the Appellee to Prove Service of the Subpoenas and the Order to Show Cause Upon Appellant J. A. Hagan.

Appellee's petition alleged that J. A. Hagan was doing business as El Rey Cheese Company and that Jack Aros and Everett Hagan were the agents and employees of said J. A. Hagan. [Tr. 2, 3.]

The subpoenas involved herein were served only upon Jack Aros and Everett Hagan, but not upon the proprietor, J. A. Hagan. [Tr. 5, 6.]

No showing was made by the Appellee that either of the Appellants Jack Aros or Everett Hagan had under their custody or control the records sought to be produced, notwithstanding that each of them had filed an affidavit in response to the Order to Show Cause alleging that said documents were under the custody and control of Appellant J. A. Hagan. [Tr. 30, 34.]

No showing was made by the Appellee nor was there any allegation in the petition or Order to Show Cause that any attempt had been made to serve the said subpoenas on Appellant J. A. Hagan.

Counsel for the Appellee made the statement at the time of the hearing of the Order to Show Cause that the Appellant J. A. Hagan was in Arizona and that the records were under the management and control of the Appellants, Jack Aros and Everett Hagan [Tr. 45], without attempting to support these conclusions with any evidence.

VII.

**The Subpoenas and the Order of the Court Below
Constitute an Unreasonable Search and Seizure
Contrary to the Fourth Amendment of the Con-
stitution of the United States.**

There was no claim by Appellee of specific wrongdoing of Appellants, nor was there any probable cause upon which to base any such claim. Any purported investigation which might have been in progress, and concerning which Appellants were entirely ignorant, was based on mere speculation of Appellee. Nowhere in the record do there appear any facts upon which Appellee could base any suspicion nor does Appellee allege that he suspects any such wrongdoing. Before the court could issue the Order here involved it was incumbent upon the court to determine whether there was evidence of such wrongdoing or probable cause and, if so, that the documents sought were relevant and material, which the court failed to do.

The courts have held that records required to be kept by law are quasi public in character but nowhere does it appear that such records may be inspected without service of process upon the owner thereof. The court did not inquire into the custody and control of said documents although this issue was raised in the pleadings and upon the hearing of the Order to Show Cause.

In the case of *Bowles v. Northwest Poultry & Dairy Products Company*, 153 F. (2d) 32, decided on January 15, 1946, by this court, the court applied the presumption of regularity attending acts of administrative agencies in deeming the mere issuance of an inspection requirement by the Administrator sufficient to show the necessity or propriety thereof to aid in the administration and enforcement of the Act and that by reason of such presumption

assumed that the Administrator did not act oppressively or undertake to pursue investigations where no need therefor was apparent. However, as the court stated, Appellee therein failed either to rebut or overcome this presumption as its *resistance to the application for inspection was based solely on the ground of the alleged invalidity of the regulation.* (Emphasis ours.)

In the case at bar the Appellants have raised questions as to the invalidity of the subpoenas involved and the right of Appellants to test the same, the failure of Appellee to introduce any proof as to the custody and control of the records sought, the relevancy and materiality of the documents required, and other grounds set forth in the within brief.

As the court below failed and refused to consider the points raised by Appellants, the Order herein involved is definitely oppressive and unreasonable and constitutes an unreasonable search and seizure contrary to the Fourth Amendment of the Constitution of the United States. *Veeder v. U. S.*, 252 Fed. 418; *U. S. v. Baumert*, 179 Fed. 737; *U. S. v. Premises in Butte*, 246 Fed. 186; *U. S. v. Pittoto*, 267 Fed. 604; *U. S. v. Rykowski*, 267 Fed. 868; *U. S. v. Kelik*, 272 Fed. 488; *Mobile Gas Co. v. Patterson*, 288 Fed. 889; *U. S. v. Micholski*, 265 Fed. 839.

Appellants have cited numerous authorities under appropriate headings in the within brief showing that the mere conclusion by the Administrator that the inspection of documents was necessary to the enforcement and administration of the Act is insufficient to overcome the guarantees under the Constitution saved to its citizens in all cases where such issues are raised. That these issues were properly and particularly raised at every stage of the within proceeding must be conceded and no presumption may be indulged in to deny to Appellants their constitutional guarantees.

VIII.

**The Subpoenas and the Order of the Court Below
Violated Appellants' Right Against Self-Incrimina-
tion Contrary to the Fifth Amendment of the
Constitution of the United States.**

The Appellants, Jack Aros and Everett Hagan, were not doing business under the regulations involved herein. They were not officers of a corporation and no proof was introduced by Appellee showing the extent of their authority, if any, to represent J. A. Hagan, who concededly was never served with any process.

Further, the subpoenas required said Appellants to give evidence *viva voce*.

Appellants Jack Aros and Everett Hagan may not violate the constitutional rights of J. A. Hagan by producing records which, in so far as the evidence shows, are not in their custody or control and concerning which they have no knowledge.

Appellee did not attempt to introduce any evidence as to the identity of any records over which said Appellants had control, if any, or whether said Appellants had any knowledge of their location or contents. In so far as the evidence is concerned, said Appellants might have been janitors.

The pleadings raised this issue and it was also brought to the attention of the court below on the hearing of the Order to Show Cause. [Tr. 30, 34, 44, 45.]

It is obvious from the petition that J. A. Hagan is the person doing business under the OPA regulations and he is the one who has the duty of keeping records and permitting inspection. Said J. A. Hagan never has been served. Only said J. A. Hagan can waive his right against self-incrimination by consenting to do business

under the regulations issued by the Office of Price Administration. Appellants Everett Hagan and Jack Aros are merely employees and are not licensed to do business by the Administrator and, therefore, the records are not, in so far as they are concerned, quasi public records. *Bowles v. Amato*, 60 F. Supp. 361; *U. S. v. Davis* (C. C. A. 2d), 114 N. Y. L. J. 471; *Bowles v. Trowbridge* (D. C., Cal., 4-6-45), 60 F. Supp. 48.

Therefore, the subpoenas and the Order of the court below violated the rights of Appellants against self-incrimination in violation of the Fifth Amendment of the Constitution of the United States.

Conclusion.

Appellants respectfully submit that the court below erred in issuing its Order requiring the Appellants to testify and produce the documents described in the subpoenas for the following reasons:

- (1) The court did not require jurisdiction of J. A. Hagan who was the only one of the Appellants subject to the provisions of the Emergency Price Control Act;
- (2) The Appellants, Jack Aros and Everett Hagan, were merely employees, were not subject to the provisions of the Act, and therefore were not the custodians or in control of the records of their employer;
- (3) The question of validity of the subpoenas was raised by Appellants at all stages of the proceeding but the court below did not at any time consider this question;

(4) The demand of Appellee that Appellants appear on a legal holiday without proper or sufficient notice was unreasonable and the court should have so held and should have quashed said subpoenas;

(5) The court refused to entertain the question of the relevancy and materiality of the documents sought to be produced although the question was raised at every stage of the proceedings;

(6) The court below at no time considered any of the issues raised in Appellants' responsive pleadings and affidavits, and based its Order on vague and indefinite conclusions and observations of Appellee's attorney;

(7) The court had no jurisdiction to issue its Order as there was no evidence of contumacy, failure, or refusal by Appellants to comply with the subpoenas, and the recital of such failure or refusal is not based upon any evidence;

(8) The constitutional rights of Appellants were violated.

Appellants are aware of the necessity of enforcing the regulations issued by the Administrator, but respectfully submit that there is a corresponding duty on the part of the Administrator to perform his functions in the manner provided by law and supported by a long and consistent line of decisions rendered by distinguished and learned jurists.

The Federal courts, in approaching the judicial problems of enforcement of the Act with a clear vision, should

not permit their vision to be dimmed with respect to the constitutional guaranties of those subject to its provisions.

The chipping away of constitutional safeguards and the gradual abrogation of rights guaranteed under the Fourth and Fifth Amendments of the Constitution may well lead to a breakdown of precedent established over the entire history of our jurisprudence, and where the right to rely upon such guarantees is raised, those guarantees should be as jealously guarded as the rights of those enforcing the laws.

Respectfully submitted,

ABRAHAM GOTTFRIED,

Attorney for Appellants.

No. 11,197

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

J. A. HAGEN, individually, and doing business as El Rey Cheese Co., JACK AROS and EVERETT HAGEN,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellee.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,

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MILTON KLEIN,

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No. 11,197

IN THE

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J. A. HAGEN, individually, and doing business as El Rey Cheese Co., JACK AROS and EVERETT HAGEN,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of
Price Administration,

Appellee.

BRIEF FOR APPELLEE.

COUNTERSTATEMENT.

The respondents (appellants herein) J. A. Hagen, individually and doing business as El Rey Cheese Co., Jack Aros and Everett Hagen are engaged in the wholesale cheese business. As dealers in this commodity respondents were subject to Maximum Price Regulation (MPR) 280 as amended (7 F.R. 10144); Revised Maximum Price Regulation (RMPR) 289, as amended (9 F.R. 5140), and Temporary Maximum Price Regulation (TMPR) 22 (7 F.R. 7914). These

regulations, in harmony with Section 202(b)¹ of the Act, require the seller to keep such records and reports as the Administrator may direct and to permit the Administrator upon request to inspect them. (Section 1351.812 of MPR 280; Section 5 of RMPR 289, and Section 1351.807 of TMPR 22; see Appendix, pp. i-iv.) A violation of any regulation is a violation of the Act. (Sec. 4(a) of the Act.)²

On May 24, 1945, the Administrator attempted to examine the records of the respondents pursuant to Section 202(a) of the Act³ for the purpose of deter-

¹Section 202 (b) provides:

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

²Section 4. (a) It shall be unlawful, regardless of any contract agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

³Section 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

mining from their books and records whether or not they had complied with the provisions of the Act and regulations. (R. 4.) On several occasions after that date respondents refused to permit the investigators to make such investigation and inspection. (R. 5.) In order to continue the investigation, the Administrator on June 9, 1945, acting pursuant to the authority conferred upon him by Section 202(c) of the Act,⁴ issue a subpoena directing each respondent to appear and produce before an enforcement attorney of the Office of Price Administration the books and records of the El Rey Cheese Co. for the period from September 28 to October 2, 1942 and from June 15, 1944 to June 8, 1945, covering purchases, sales, and deliveries made by the company of Swiss Gruyere Type cheese and Taylor-Maid Gruyere Type Swiss cheese. (R. 10-11.) The subpoena was properly served on respondents Jack Aros and Everett Hagen (R. 6), and made returnable June 11, 1945. Respondents by their attorney first refused to obey the subpoenas on the ground that the time allowed within which to comply with it was too short. On the return date, respondents' attorney claimed he would not permit his clients to answer it because it was not signed personally by Chester Bowles but by the Acting District Director. (R. 17.) Thereupon, on August 13, 1945, subpoenas similar in content to the previous ones, but signed personally by Chester Bowles were served upon respondents Jack Aros, bookkeeper, agent and attorney-in-fact of respondent com-

⁴Section 202. (c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify, or to appear and produce documents, or both, at any designated place.

pany, and Everett Hagen, manager, returnable on August 16. (R. 18, 11-14.) On the latter day an attorney for the respondents appeared specifically for the purpose of quashing the issuance and service of the subpoena upon various grounds.⁵ (R. 20-22.) Because of this refusal, the Administrator, in accordance with the provisions of Section 202(e)⁶ of the Act applied to the Court below for an order compelling obedience with the subpoena. (R. 2-9.) Respondents moved to dismiss these proceedings and filed affidavits in support of their motion. (R. 24-34.) After a hearing, the Court on October 29, 1945, entered orders directing respondents to comply. (R. 35-37.) From these orders, the present appeals are taken. (R. 37.)

Respondents have assigned eight different specifications of error on this appeal. Substantially each of

⁵In brief, these were (R. 21-22) :

- (1) That the President of the United States had proclaimed August 16 a legal holiday for all Federal Offices;
- (2) That he questioned the authenticity of Chester Bowles' signature;
- (3) That insufficient notice was given;
- (4) That the Fourth Amendment of the Constitution was violated; and
- (5) That the information requested was not material to any investigation authorized by the Price Administrator nor within his authority to demand.

⁶Section 202 (e) :

"(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a)."

these objections have already been found to be wholly wanting in merit in the recent decision of the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 66 S.Ct. 494, and three previous decisions of this Court (*Bowles v. Glick Brothers Lumber Co.*, 146 F. (2d) 566 (C.C.A. 9th), cert. denied 65 S.Ct. 1554; *Bowles v. Abendroth*, 151 F. (2d) 407 (C.C.A. 9th); *Bowles v. Northwest Poultry & Dairy Co.*, 153 F. (2d) 32 (C.C.A. 9th)). We will discuss these specifications of error in order.

ARGUMENT.

POINT I.

THERE IS NO MERIT EITHER TO THE FIRST SPECIFICATION OF ERROR THAT THE COURT BELOW ERRED IN ISSUING ITS ORDER WHERE THERE WAS NO SHOWING OF RELEVANCY OR MATERIALITY OF THE DOCUMENTS SOUGHT TO BE PRODUCED, OR TO THE SECOND SPECIFICATION OF ERROR THAT THE ADMINISTRATOR MUST PRODUCE SUCH EVIDENCE BEFORE THE SUBPOENA WILL BE ENFORCED.

In respondents' first contention it is urged that the Court erred in issuing its order where there was no showing of relevancy or materiality of the documents sought to be produced. In their second specification of error respondents argue that the Administrator must produce such evidence before the subpoena will be enforced. These two contentions will be treated together.

The petition and affidavits in support of the order enforcing the subpoena recite that the respondents are engaged in the business of selling at wholesale various types of cheese and as such are subject to the provisions of MPR 280, 289 and GMPR (R. 3); that petitioner

deemed an investigation necessary to determine if respondents have complied with the Act and to assist in the administration and enforcement of the Act (R. 4); that in conducting said investigation it was necessary to obtain information from the records kept by El Rey Cheese Co. in the regular course of business; that this information could most efficiently be obtained by an inspection of respondents' records which it was required to keep by the above regulations; that investigators on several occasions requested inspection of certain records pertaining to the sale of certain cheeses subject to these regulations; that these were the records which were requested in the subpoena (R. 5); and that the records required to be produced are "relevant and material to said investigation". (R. 7-8.)

Respondents' principal complaint is that the Administrator has failed to allege that any violation has been committed. (Respondents' Brief, p. 8.) A showing of "probable cause" however is not a prerequisite for enforcement of an administrative subpoena. (*Walling v. Oklahoma Press Publishing Co.*, 66 S.Ct. 494; *Bowles v. Glick Lumber Brothers Co.*, supra; *Bowles v. Insel*, 148 F. (2d) 91 (C.C.A. 3rd).) "It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." (*Walling v. Oklahoma Press Publishing Co.*, supra.)

Next, it is to be noted that respondents do not claim that the specific cheeses, records of which inspection is

sought here, are not covered by the regulations, or that their transactions respecting them are exempt from regulation. Respondents merely claim a failure to charge such coverage in the petition in support of enforcement of the subpoena. But this is not enough to overcome the presumption of regularity which normally attends the acts of administrative officers. (See *Bowles v. Northwest Poultry & Dairy Products*, *supra*.) Apart from that, this omission in the petition was not fatal, since the Court is required to take judicial notice of the provisions of the regulations. (Federal Register Act, 44 U.S.C. #307; *United States ex rel. Brown v. Lederer*, 140 F. (2d) 136 (C.C.A. 7th), cert. denied 322 U.S. 734.)

Moreover, in an ex parte inquiry to determine the existence of violations of a statute, standards of materiality or relevance are far less rigid than those applied in a trial or adversary proceeding. Judge Cardozo (later Mr. Justice) stated the reason for the rule in *Matter of Edge Ho Holding Corp.*, 256 N.Y. 374, 176 N.E. 537 (256 N.Y. at 382):

“Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ.”

And as said in *Walling v. American Rollof Corporation*, 135 F. (2d) 1003 (C.C.A. 2nd) (at p. 1005):

"It may be that the refused records will not bear directly upon that subject but we cannot say they won't or that they won't supply needed information for use in checking other facts and records. As the administrator has not been shown to have abused its discretion in the selection of the records to be inspected we agree that the order below was without error."

The reasoning applied in those cases is particularly applicable here. Section 202 of the Act grants extremely broad investigative power and authorized the Administrator "to obtain, by subpoena or documents or otherwise, 'such information as *he deems necessary or proper*' to assist him in enforcing the act and regulations thereunder. 50 U.S.C. Appendix #922(a)". (Italics ours.) (*Bowles v. Bay of New York Coal and Supply Corporation*, 152 F. (2d) 330 (C.C.A. 2nd).) The legislative intent is equally clear to provide authority for obtaining "any information, oral or written, which may be of assistance to the Administrator in carrying out his duties". (Senate Report No. 931, 77th Cong. 2nd Sess. p. 8.)⁷ "The statute granting him

⁷In reporting on the bill (H.R. 5990) which later became the Emergency Price Control Act, the Senate Committee on Banking and Currency said concerning the investigatory powers granted to the Price Administrator: "The committee, of course, recognizes that competent administration and enforcement of the act will be impossible unless the Administrator and persons acting under his direction are given broad investigatory powers. To this end the bill, like most recent legislation, provides authority for obtaining *any information, oral or written, which may be of assistance to the Administrator in carrying out his duties.* Power to enforce the right of inspection and to compel oral testimony and the production of documents is given to the appropriate courts." Senate Report No. 931, 77th Cong., 2nd Sess., p. 8. (Italics ours.)

powers is inclusive and all embracive when it comes to investigation." (*Bowles v. Shawano National Bank*, 151 F. (2d) 749, 751 (C.C.A. 7th), cert. denied 66 S.Ct. 680.) The Administrator's plenary powers includes not only the right to inspect records required to be kept by the regulations, but likewise records not required to be kept by the regulations, so long as the information will be of aid in assisting him in the discharge of his duties. (*Bowles v. Shawano National Bank*, supra,⁸ where examination of bank records of a cheese dealer was allowed.) The provisions of the Act relating to inspection of records apply not only to persons who are subject to the Act (Sec. 202(b)) but as well to "any other person" (Sec. 202(c)) who may provide "any" information to assist the Administrator in achieving the purposes of the Act.

It is true, as respondents say (pp. 13-14 of their brief), that the mere issuance of an administrative subpoena does not require the District Court to enforce it in every case. Some of the limits within which a Court may exercise its discretion in declining enforcement of a subpoena have already been indicated by this Court, as for example where the subpoena is vague or unreasonably burdensome or unauthorized by statute. (*Bowles v. Abendroth*, 151 F. (2d) 407 (C.C.A. 9th).)

⁸"The Administrator, *ex necessitate*, needs investigatory powers both to promulgate rational orders and regulations, and to apprehend violations thereof. He cannot intelligently make charges without knowing facts to substantiate them. The accused would vigorously and justly protest against unfounded charges. How is the Administrator to unearth such violations or to confirm information given him by aggrieved persons or alert citizens? By investigation and checking, of course." (151 F. (2d) at p. 751.)

But it is not to be presumed that the Administrator has "acted oppressively or undertaken to pursue investigations where no need therefor is apparent". (*Bowles v. Glick Brothers Lumber Co.*, *supra*; *Bowles v. Northwest Poultry & Dairy Co.*, *supra*.) The probable materiality of the records may appear from the face of the subpoena and petition supporting it. (*Brown v. United States*, 276 U.S. 134, 143.) And there can be no doubt at all from the face of the petition and the attached subpoena in this case, that the records requested are clearly relevant to a lawful inquiry.

Neither is there any substance to respondents' claim that the Court below was oblivious of the fact that the records requested must be material to the inquiry at hand. On the contrary, the Court said: "if the questions are immaterial * * * and violate their constitutional rights * * * this court is not going to make them answer." (R. 57.) There is therefore no merit whatever to Specifications of Error 1 and 2.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO HEAR EVIDENCE AS TO THE VALIDITY OF THE EXECUTION OF THE SUBPOENAS.

In the third specification of error respondents claim that the Court erred in refusing to hear evidence as to the validity of the execution of the subpoenas.

In an affidavit in support of the motion to enforce the subpoena, an attorney for the Office of Price Ad-

ministration alleged that the subpoenas "have been signed personally by the Administrator" (R. 18) but respondents persisted in questioning the authenticity of this signature, although they offered no proof casting doubt upon it on the hearing.

Since the subpoena bore an official signature of a federal officer, it must be presumed to be genuine. (7 *Wigmore on Evidence* #2167 (3rd Ed.); *Wynne v. United States*, 217 U.S. 234.) In the last cited case, it was claimed that a copy of a vessel's enrollment purporting to be signed and sealed by a deputy collector of customs was not genuine. The Court disposed of this contention as follows:

"There was no evidence whatever casting suspicion upon the genuineness of the copy or of the seal or the signature of Farley, and none which challenged in any way the American character of the ship. Under such circumstances and for the purposes of this case it was not error to assume that the document was genuinely executed by Farley, that he was what he claimed to be, a deputy collector of customs, and that his signature had been signed by himself or one authorized to sign for him. (3 Wigmore, Ev. #2161.)"

Moreover in California, Courts take judicial notice of " * * * The official signatures * * * of the principal officers of government in the legislative, executive and judicial departments of this State and of the United States". (C.C.P. 1872, #1875.) See also, Rule 43 of the Federal Rules of Civil Procedure.⁹

⁹Rule 43(a). Form and Admissibility. * * * All evidence shall be admitted which is admissible under the statutes of the United

There is therefore no merit to this specification of error.

POINT III.

THERE IS NO MERIT TO THE FOURTH SPECIFICATION OF ERROR THAT THE SUBPOENAS WERE UNCERTAIN, INDEFINITE, AND UNREASONABLE.

Respondents argue in their fourth specification of error that the subpoenas were uncertain, indefinite, and unreasonable. It is true that the subpoenas asked for the production of "all of the books, ledgers, day books, purchase and sales invoices, etc." in the sales of the two specified cheeses for a period of about one month in 1942 and for the period June, 1944 to June, 1945. Respondents object to the use of the word "etc." as suggesting a general and sweeping investigation.

The only requirement as to the specification of the documents sought to be examined is that the subpoena must describe them with such precision as is reasonably possible. The subpoena here challenged complies with this rule. Properly construed, the word "etc." merely means other records dealing with the same subject matter; it does not include records which have no relation to the commodity investigated. Even if the term "etc." may be said to include *all* documents relating to all the transactions in the two specific cheeses

States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

investigated, it would still be enforceable. (*Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 554; *Nelson v. United States*, 201 U.S. 92.) "We see no reason why all such books, papers and correspondence which related to the subject of the inquiry, should not be called for and the company directed to produce them. Otherwise the state would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have." (*Consolidated Rendering Co. v. Vermont*, supra, 207 U.S. at p. 554; see also footnotes 40 and 46 of the *Oklahoma Press Publishing Co.* case for other examples of far greater scope and time than was sought in these proceedings.)

However, whether the word "etc." was properly used in the subpoena is of no materiality here. All that is involved on this appeal is the scope of the order of the Court, and this order omits any reference to "etc." (R. 36.) The order of the Court is wholly free from uncertainty and indefiniteness. (Cf. *Cudmore v. Bowles*, 145 F. (2d) 697 (App. D.C.).) Since it is limited to records relating merely to Swiss Gruyere Type cheese and Taylor-Maid Gruyere Type Swiss cheese for the period from September 28 to October 2, 1942 and from June 15, 1944 to July 28, 1945, it was clearly reasonable in respect to the number of commodities or the period of time covered (*Oklahoma Press Publishing Co. v. Walling*, supra; *Brown v. United States*, 276 U.S. 138), and "should have been obeyed without recourse to the Court". (*Cudmore v. Bowles*, supra.)

POINT IV.

THE COURT DID NOT ERR IN HOLDING THAT RESPONDENTS HAD FAILED TO ANSWER AND APPEAR AT THE TIME AND PLACE CALLED FOR IN SAID SUBPOENAS.

In their fifth specification of error respondents complain that the Court erred in holding (R. 35) that they failed to answer and appear at the time and place called for in said subpoenas. There is ample evidence to support this finding of the Court below.

Respondents do not claim they personally appeared in response to the subpoenas but only that their attorney appeared for the purpose of resisting the subpoena upon "legal and sufficient grounds". Clearly this was no appearance by respondents. The record shows that respondents refused to appear in answer to the subpoenas, first (R. 17) on the excuse that inadequate time was allowed by the subpoena, then (R. 17) on the pretense that the subpoena was not signed by the Administrator, and finally (R. 19, 21-22) when the subpoena was actually signed by the latter, they refused to allow inspection because of a host of other technical objections, none of which the Court found to be tenable. And even now they are still continuing to obstruct the administrative process by refusing to allow their records to be inspected. Little wonder, therefore, that the Court found that respondents had failed and refused to obey the subpoenas. There was no room for any other conclusion.

Apart from that, it is immaterial on this appeal whether or not respondents failed to answer and appear at the time and place called for in said subpoena,

since they also disobeyed the subpoena by failing and refusing to produce the records designated therein.

POINT V.

THE COURT BELOW DID NOT ERR IN REFUSING TO REQUIRE THE ADMINISTRATOR TO PROVE SERVICE OF THE SUBPOENAS AND THE ORDER TO SHOW CAUSE UPON RESPONDENT J. A. HAGEN.

In their sixth specification of error, respondents claim that the subpoenas were served only on Jack Aros, bookkeeper, and Everett Hagen, manager, but not upon the proprietor, J. H. Hagen; that no showing was made that either of these two respondents had custody or control of the records; and no showing was made that any attempt was made to serve J. A. Hagen.

The order of the Court below merely directs Aros and Everett Hagen to obey the subpoenas, not J. A. Hagen, so that this is not a case where it can be said that the order is broader than the jurisdiction which the District Court obtained under the service.

While Jack Aros and Everett Hagen both deny the records are in their control, they do not disclaim custody or possession. And J. A. Hagen, alleged proprietor, has submitted no affidavit to support the objection that control of the records is solely in him. The issue of whether Aros and E. Hagen had control of the records was a question of fact for the District Court to decide. Apparently, the Court was little impressed with respondents' excuse. So also in *Bowles v. Feld*, 148 F. (2d) 91 (C.C.A. 3rd), respondent, an

alleged partner of a firm, likewise disclaimed control on the ground that he was no longer a partner of the firm subpoenaed, but the Circuit Court of Appeals dismissed this contention as one "so lacking in merit as not to warrant discussion". (See also, *Bowles v. Bay of New York Coal & Supply Co.*, 152 F. (2d) 330 (C.C.A. 2nd), where similar disposition was made of a contention advanced by an assistant secretary of a corporation where the subpoena was directed to the corporation by its president.)

Apart from these considerations, respondents' argument is of no materiality at this stage of the proceeding. Whether respondents have the records in their control or whether they are deliberately withholding them, is a matter for the District Court to decide if and when the Court's order is disobeyed. "No more is now involved than the judgment and order of the District Court." (*Cudmore v. Bowles*, supra.)

POINT VI.

THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT.

In their seventh specification of error, respondents urge that the subpoenas and order of the Court below constitute an unreasonable search and seizure under the Fourth Amendment. Once again respondents repeat their prior contentions of the absence of any showing of "probable cause"; that the Court below failed to find that the documents sought were relevant and material; and that the Administrator seeks to inspect records without service of process on the owner. These

objections have been considered at an earlier portion of this brief. In no respect have respondents shown that the present inquiry is oppressive or that the Administrator has abused its discretion in any way in seeking to proceed with this investigation. Both the subpoenas and the order of the Court below enforcing them plainly meet the standards of relevancy, specificity and reasonableness. Respondents' plea that their rights secured by the Fourth Amendment have been violated "only raises the ghost of controversy long since settled adversely to their claim". (*Oklahoma Press Publishing Co. v. Walling*, supra; see also, *Bowles v. Glick Lumber Products Co.*, supra; *Bowles v. Northwest Poultry & Dairy Products Co.*, supra; *Bowles v. Feld*, supra.)

POINT VII.

THERE WAS NO VIOLATION OF THE FIFTH AMENDMENT.

Neither is there any merit to respondents' last specification of error that the subpoenas and order of the Court below violated their rights against self-incrimination contrary to the Fifth Amendment.

Records, of which examination is requested, are those that respondents were required to keep by law. They were therefore quasi-public papers which respondents may be compelled to produce even though the contents of these records may tend to incriminate them. The constitutional privilege against self-incrimination does not extend to such records. (*Bowles v. Glick Bros. Lumber Co.*, supra, 146 F. (2d) at p.

571; *Coleman v. United States*, 153 F. (2d) 400 (C.C.A. 6th); *Wilson v. United States*, 221 U.S. 361, 380; *Bowles v. Rothman*, 145 F. (2d) 831 (C.C.A. 2nd); *Rodgers v. United States*, 138 F. (2d) 992, 996 (C.C.A. 6th); *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774 (C.C.A. 10th); *Cudmore v. Bowles*, supra.)

Even if the records of which inspection was sought were not quasi-public records, the privilege against self-incrimination would still be unavailable because of Section 202(g) of the Act. This section provides:

“No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C. 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.”

The Act thus requires the respondents to appear and specifically claim their privilege, at which time the Administrator or his representative may nevertheless require the testimony in question, but respondents, by operation of law, will receive immunity granted by the terms of the Act. Thus the Act clearly states that a person may not rely on the claim of privilege as a defense in these proceedings.

It is apparent also that questions of constitutional privilege against self-incrimination are not pertinent to the issues in this proceeding to enforce an administrative subpoena. Rather this is a question to be determined in any criminal prosecution or penal action

which may subsequently be instituted. As was said in *Cudmore v. Bowles*, supra:

"On this appeal, it is contended that the order of the Administrator violated appellant's constitutional rights, because of penalties which might have been imposed upon him or upon the corporation, of which he is secretary and owner of one-half its capital stock, as a result of disclosures which might have been made in these invoices, of possible innocent and unintentional violations of price ceilings. It must be noted in the first place that this contention is beside the point, as no more is now involved than the judgment and order of the District Court. * * *"

CONCLUSION.

The inspection sought by the subpoena was not "plainly incompetent or irrelevant to any lawful purpose" of the Administrator in the discharge of his duties under the Act, and it was therefore "the duty of the District Court to order its production". (*Endicott-Johnson Corporation v. Perkins*, 317 U.S. 501, 509.) It is evident that respondents' embrace of constitutional guaranties merely masks a well designed interference with the orderly, usual and well established procedure of administrative agencies.

The order of the Court below is proper in all respects and should be affirmed.

Dated, May 6, 1946.

Respectfully submitted,

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

MILTON KLEIN,

Director, Litigation Division,

DAVID LONDON,

Chief, Appellate Branch,

NATHAN SIEGEL,

Special Appellate Attorney,

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Office of Price Administration,

San Francisco, California.

(Appendix Follows.)

Appendix.

Appendix

REGULATIONS.

1. Maximum Price Regulation 280. (8 F.R. 5165.)

§ 1351.812. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall also preserve all information and records required by § 1351.807 of Temporary Maximum Price Regulation No. 22, and shall keep for examination by any person during ordinary business hours a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period, together with an appropriate identification of such product and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has customarily kept relating to the prices which

he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

2. Revised Maximum Price Regulation 289. (9 F.R. 5140.)

SEC. 5. *Records and reports.* (a) Every sale of a listed dairy product covered by this Revised Maximum Price Regulation 289, except as hereafter provided in this regulation, shall be invoiced by the seller. The original invoice shall be delivered to the buyer and shall state (1) the date of purchase, (2) the names and addresses of the buyers and sellers, (3) the quantity, grade, and type of package of each listed dairy product sold, (4) the price, per unit of sale and in total, and (5) the geographical place for which the price is calculated.

(b) Every buyer of any listed dairy product shall preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, the original, and every seller of any listed dairy product shall similarly preserve a copy, of each invoice required to be furnished by paragraph (a) of this section.

(c) Every person subject to this regulation shall keep such other records and shall submit such reports as the Office of Price Administration may from time to time request in writing, either in addition to or in substitution for records and reports therein required.

3. **Temporary Maximum Price Regulation No. 22. (7 F.R. 7914.)** This regulation, issued October 3, 1942, was superceded by Maximum Price Regulation No. 280 on December 3, 1942.

§ 1351.807. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall prepare, on or before October 24, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period together with an appropriate identification of such product, and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Temporary Maximum Price

Regulation No. 22, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

No. 11200

**United States
Circuit Court of Appeals
for the Ninth Circuit.**

UNION PACIFIC RAILROAD COMPANY, a Corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Appellants,

vs.

W. L. OLIVE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED

JAN 17 1946

PAUL P. O'BRIEN,
CLERK

No. 11200

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

McNAMEE & McNAMEE,
El Portal Building,
Las Vegas, Nevada,
For the Appellants.

HAM & TAYLOR,
Boggs Building,
Las Vegas, Nevada,
For the Appellee. [*1]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Eighth Judicial District Court of the State
of Nevada In and For the County of Clark

No. 11,746

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a
corporation; LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a corporation, and
WILLIAM MORLEY,

Defendants.

COMPLAINT

Comes now the plaintiff and for a cause of action
against the defendants, alleges:

I.

That the plaintiff is, and at all times hereinafter
mentioned, was a resident of Clark County, State
of Nevada;

II.

That the defendant, William Morley, is now, and
at all times hereinafter mentioned, was a resident
of Clark County, State of Nevada;

III.

That the defendant, Union Pacific Railroad Com-
pany, is a corporation organized and existing under
and by virtue of the laws of the State of Utah;
That the defendant, Los Angeles & Salt Lake Rail-
road Company, is a corporation organized and ex-

isting under and by virtue of the laws of the State of Utah;

IV.

That for more than ten (10) years immediately preceding the first day of January, 1936, the defendant Los Angeles & Salt Lake Railroad Company, a corporation, was engaged as a common carrier of passengers and freight in the operation of its railroad in the State of Nevada; that its main line track, during the said period, entered into the County of Clark at or near Jean, Nevada, and extends northeasterly through the City of Las Vegas, County of Clark, State of Nevada, and thence northeasterly through the said County of Clark and on to Salt Lake City, Utah.

V.

That the plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that for a period of five (5) years and more immediately preceding the first day of January, 1936, the defendant corporation Union Pacific Railroad Company was engaged in the transportation of passengers and freight over and along its system of railroads from Chicago, Illinois, to [3] Los Angeles, California, and intermediate points, under the name and style of "Union Pacific System"; That the defendant Los Angeles & Salt Lake Railroad Company is, and was at said times, a part of and member of said "Union Pacific System" aforesaid, and during all of said period of time and up to the present the said defendant Union Pacific Railroad

Company has, under an arrangement known to the defendants but unknown to the plaintiff, used the tract, cars, locomotives, employees, including the plaintiff herein, and other facilities of the defendant Los Angeles & Salt Lake Railroad Company, jointly with the latter named company, between Los Angeles, California, and Salt Lake City, Utah, for the purpose of conveying its freight and passenger traffic over the said railroad of the defendant Los Angeles & Salt Lake Railroad Company aforesaid.

VI.

That the plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that on the first day of January, 1936, the defendant corporation Los Angeles & Salt Lake Railroad Company entered into a written agreement with the defendant Union Pacific Railroad Company whereby and in virtue of which as Lessor, the said Los Angeles & Salt Lake Railroad Company did lease, demise, assign and transfer to Union Pacific Railroad Company, defendant herein, its successors and assigns:

(a) All lines of railroad, together with all rights, privileges, franchises and rolling stock and other property appertaining thereto, now or at any time during the term of this lease owned by the Lessor.

(b) All right, title and interest of the Lessor in and to all other lines of railroad, railroad terminals and other operating properties, together with all rights, privileges, franchises and property appertaining thereto, operated, used or possessed by

the Lessor, solely or jointly with other companies, under or by virtue of leases, joint ownership agreements, grants of trackage rights, [4] or other contracts, and all right, title and interest of the Lessor in and under all such leases, joint ownership agreements, grants of trackage rights and other contracts.

(c) All miscellaneous physical properties owned by the Lessor, and all right, title and interest of the Lessor in and to miscellaneous physical properties used or possessed by it under lease or contract, and all right, title and interest of the Lessor in and under all such leases and contracts.

(d) All right, title and interest of the Lessor in and under any and all other ordinances, grants, easements and licenses held or enjoyed for the purpose of or in connection with the operation or use of the demised premises, and in and under any and all contracts for telegraph, express, Pullman car, or refrigerator car services and other contracts of every kind relating to the operation of the demised premises, whether now in force and effect or acquired or made during the term of this lease.

That the said lease and agreement is now in full force and effect.

VII.

That for a period of more than ten (10) years immediately prior to January 1, 1936, the plaintiff herein had been employed jointly by the defendant Los Angeles & Salt Lake Railroad Company and the defendant Union Pacific Railroad Company, as

a Car Repairman and Car Inspector, at the shop of the defendants, at Las Vegas, Nevada.

VIII.

That on the first day of November, 1934, while so employed, plaintiff was a member of the labor organization known as and called the "Brotherhood Railway Carmen of America."

IX.

That on the first day of November, 1934, while the plaintiff was a member of the said Brotherhood Railway Carmen of America, and employed by the defendant corporations as a Car Repairman and [5] Car Inspector, the said Brotherhood was then the recognized and authorized bargaining agency for the said men then employed by the defendants Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company.

X.

That on the first day of November, 1934, the said Brotherhood Railway Carmen of America entered into an agreement for the benefit of all members of said Brotherhood Railway Carmen of America with the Los Angeles & Salt Lake Railroad Company and the Union Pacific Railroad Company, which said agreement set forth the respective rights and duties of the said corporations and the said Brotherhood Railway Carmen of America and the individual members thereof with respect to the employment of the members of the said Brotherhood Railway Carmen of America.

XI.

That the said agreement provides, among other things, as follows:

“No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.” Rule 37.

“No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation.” Rule 38.

XII.

That the said agreement is now and has been ever since the first day of November, 1934, in full force and effect. [6]

XIII.

That on the 25th day of May, 1936, the plaintiff herein, while so employed by the defendants, Union

Pacific Railroad Company and Los Angeles & Salt Lake Railroad Company, was unlawfully and without cause, suspended from service and from such employment, and remained suspended from service until the 20th day of August, 1936, at which time the plaintiff was, unlawfully and without cause, by the said defendants, dismissed and discharged from service of the said defendants, and both of them.

XIV.

That prior or incidental to the said suspension, dismissal or discharge, the plaintiff was not accorded a fair or any hearing by a designated officer of the defendants, or either of them.

XV.

That the plaintiff, prior to the said suspension, dismissal and discharge, was not apprised of the precise charge, or any charge, against him by the defendants, or either of them.

XVI.

That prior to the said suspension, dismissal and discharge the plaintiff herein was not given an investigation.

XVII.

That prior to the time of the said suspension, dismissal and said discharge, and ever since the said suspension, dismissal and discharge, the plaintiff has presented himself for employment to the said defendants, agreeably with the provisions of said contract; that at all said times the said offer was made in good faith and the plaintiff was ready,

able and willing to perform his services, agreeably with the provisions of the said contract but the defendants, at all said times mentioned, failed and refused to employ or reinstate the plaintiff herein and have failed and refused to compensate him for wages or time lost since the said dismissal and discharge. [7]

XVIII.

That the plaintiff was not afforded a reasonable or any opportunity to secure the presence of necessary or any witnesses in his behalf nor was he afforded the right to be present himself or with counsel, relating to the causes for suspension or discharge, or at all.

XIX.

That prior to the said suspension, dismissal and said discharge, plaintiff was, except when on leave of absence, earning regularly the sum of Six and 32/100 Dollars (\$6.32) per 8-hour day for six (6) days a week for each and every week, and the said sum was, at the time of said suspension, dismissal and discharge, and now is, the regular going wage for like employment.

XX.

That since the wrongful suspension and discharge aforesaid, and as a result thereof, the plaintiff herein has, to the 25th day of March, 1941, been deprived of compensation, as a result of said suspension and dismissal, for a period of four (4) years and ten (10) months, or a total of Nine Thou-

sand Five Hundred Thirty and 56/100 Dollars (\$9,530.56).

XXI.

That according to the provisions of the said contract hereinbefore referred to, executed on November 1, 1934, the plaintiff was, and is, entitled to receive such employment, with compensation, from the defendants throughout his entire life or until he should reach the age of 65 years; that on the 25th day of March, 1941, the plaintiff was thirty-seven (37) years of age, and had an expectancy of life of 30.35/100th years; that he had an expectancy of 28 years before reaching the age of sixty-five (65) years; that by virtue of such contract he was entitled to employment at the said going rate of wages of Six and 32/100 Dollars (\$6.32) per 8-hour day for six (6) days a week for a period of twenty-eight (28) [8] years; that by virtue of such suspension, dismissal and discharge plaintiff has been deprived of said employment to his damage in the sum of Fifty-Five Thousand Two Hundred Eleven and 52/100 Dollars (\$55,211.52), in addition to all damages accrued to March 25, 1941.

XXII.

That plaintiff herein and the Brotherhood Carmen of America have repeatedly, since the said suspension and discharge, appealed to the defendants herein to restore the plaintiff herein to his employment and to compensate him for time so lost because of such suspension and discharge but the defendants herein, at all times, have failed and re-

fused, and continue to fail and refuse, to so compensate the plaintiff and restore his employment.

XXIII.

That the defendant William Morley was at all times herein mentioned general Foreman for the defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and he is the person who, as Agent of the said defendant corporations, made the decision to so wrongfully and without cause, and did so cause the discharge and dismissal of the plaintiff as aforesaid.

Wherefore, the plaintiff prays judgment against the defendants, and each of them:

1. For the sum of Sixty-four Thousand Seven Hundred Forty-two and 08/100 Dollars (\$64,742.08), together with interest at the rate of seven percent per annum (7%) on the said sum from the 25th day of March, 1941, until paid;
2. For the plaintiff's costs herein and such other and further relief as to the Court may seem meet and proper.

HAM & TAYLOR

By /s/ RYLAND G. TAYLOR

Attorneys for Plaintiff.

Complaint filed March 31, 1941, Lloyd S. Payne, Clerk, by Jean Purdue, Deputy. Verified by Plaintiff.

No. 160 U. S. Dist. Court, Dist. Nevada. Filed May 7, 1941. O. E. Benham, Clerk. By O. F. Pratt, Deputy.

[Endorsed]: Filed March 31, 1942 [9]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto and their respective counsel that the Supplement to Complaint, a copy of which is hereunto annexed, may be filed in the above entitled action. It is further stipulated that the matters in said Supplement to Complaint be, and the same hereby are deemed denied by the defendants.

Dated this 19th day of April, 1945.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff

LEO A. McNAMEE, Esq., and

FRANK McNAMEE, Jr., Esq.,

Attorneys for Defendants

By LEO A. McNAMEE

[Endorsed]: Filed April 21, 1945. [10]

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT

Comes now the plaintiff, pursuant to Stipulation, and as and for his supplement to his Complaint herein, adds to the said Complaint Paragraph XXA and alleges:

XXA.

That since the 25th day of March, 1941, and including the 19th day of March, 1945, the plaintiff herein has been deprived of compensation and wages as a result of such suspension and dismissal to his damage in the sum of \$7,849.00.

Wherefore, Plaintiff prays judgment according to the prayer of his original Complaint herein.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff

Receipt of copy of the above and foregoing Supplement to Complaint admitted this 19th day of April, 1945.

LEO A. McNAMEE

Attorney for Defendants.

[Endorsed]: Filed April 21, 1945. [11]

[Title of District Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

The Petition of Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, above named, respectfully represents to this Honorable Court:

I.

That the true name of the Defendant, William

Morley, is Willard T. Morley, instead of William Morley as alleged in Plaintiff's Complaint herein.

II.

That the above entitled action has been brought in this Court and is now pending therein, and at the time this Petition was filed the time within which the Defendants are required to answer or otherwise plead has not expired and will not so expire until April 11, 1941.

III.

That said action is of a civil nature, being an action to recover damages for an alleged breach of contract. Said action is one over which the United States District Courts are given jurisdiction, as will appear from the allegations of this Petition and from the Complaint on file herein. [12]

IV.

The value of the matter in controversy in this action is in excess of \$3,000.00, exclusive of interest and costs, as appears from the allegations of Plaintiff's Complaint on file herein, wherein Plaintiff prays for judgment against the Defendants for the sum of \$64,724.08.

V.

The controversy in said action is, and at the time of the commencement of said action was, entirely between citizens of different states, in that Union Pacific Railroad Company, a corporation, one of your Petitioners, was at the time of the commencement of said action, and still is, a corporation duly organized and existing under and by virtue of the laws of

the State of Utah, and is a citizen and resident of said State of Utah, and is not a citizen or resident of the State of Nevada. That Los Angeles and Salt Lake Railroad Company, a corporation, one of your petitioners, was at the time of the commencement of said action, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and is a citizen and resident of the State of Utah, and is not a citizen or resident of the State of Nevada. That W. L. Olive, Plaintiff, in said action, was at the commencement of said action, and still is, a citizen and resident of the State of Nevada.

VI.

Your Petitioners aver that, as hereinafter more fully shown, the Plaintiff in this cause has improperly and fraudulently joined as Defendant in said cause the said Union Pacific Railroad Company, a corporation, a citizen and resident of the State of Utah, Los Angeles & Salt Lake Railroad Company, a corporation, a citizen and resident of the State of Utah, and William Morley, whose true name is Willard T. Morley, a citizen and resident of the State of Nevada; and that said William Morley, whose true name is Willard T. [13] Morley, is not a real Defendant or paper defendant, and his being joined as a Defendant with your Petitioners, the Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, in this cause was a mere sham and pretext

on the part of Plaintiff, and was done solely to prevent a removal of this cause by your Petitioners, Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, to the District Court of the United States, in and for the District of Nevada.

VII.

Your Petitioners further state that the following facts are alleged in Plaintiff's Complaint as constituting his cause of action against these Defendants, to-wit:

(a) That for more than ten years immediately prior to January 1, 1936, Plaintiff had been employed jointly by the Defendant, Los Angeles & Salt Lake Railroad Company, and the Defendant, Union Pacific Railroad Company, as a car repair man and Car Inspector, at the Defendants' shop at Las Vegas, Nevada. That on November 1, 1934, while so employed, Plaintiff was a member of the labor organization known as and called the "Brotherhood Railway Carmen of America," and on said last mentioned date while Plaintiff was such a member of said Brotherhood and employed by the Defendant corporations, said Brotherhood was then the recognized and authorized bargaining agent for said men then employed by said Defendant Railroad Companies, and on said last mentioned date said Brotherhood entered into an agreement, for the benefit of all its members, with the Defendant Railroad Companies, which agreement set forth the respective rights and duties of said corporations and said

Brotherhood and the individual members thereof with respect to the employment of the members of said Brotherhood.

(b) That said agreement provides, among other things, to [14] the effect that no employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employee will be apprised of the precise charge against him, and shall have a reasonable opportunity to secure witnesses and have the right to be represented by counsel. If it be found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation. That said agreement at the time of the commencement of this action, and ever since November 1, 1934, has been in full force and effect.

(c) That on May 25, 1936, the Plaintiff, while employed by the Defendant Railroad Companies, was unlawfully and without cause, suspended from service and from such employment, and remained suspended from service until the 20th day of August, 1936, at which time the Plaintiff was, unlaw-

fully and without cause, by said Defendants, dismissed and discharged from service of the said Defendants.

(d) That prior or incidental to said suspension, dismissal or discharge, Plaintiff was not afforded a fair or any hearing by a designated officer of the Defendants, or either of them, and was not apprised of the precise charge, or any charge, against him by the Defendants, or either of them; and was not given an investigation; that prior to the time of said suspension, dismissal and discharge, and ever since, the Plaintiff has presented himself for employment to the Defendants, agreeably with the provisions of said [15] contract, and that at all times said offer was made in good faith and Plaintiff was ready, able and willing to perform his services, but Defendants failed and refused to employ or reinstate Plaintiff, and have failed and refused to compensate him for wages and time lost since said dismissal and discharge, and that he was not afforded an opportunity to secure the presence of witnesses in his behalf, nor afforded the right to be present himself or with counsel, relating to the causes for suspension or discharge. That Plaintiff, at the time of said discharge and prior there to, was earning regularly the sum of \$6.32 per eight-hour day for six days a week for each and every week; that said sum was the regular going wage for like employment. That since the wrongful suspension and discharge aforesaid, the Plaintiff has, to March 25, 1941, been deprived of compensation, as a result of said discharge, for a period of four years and ten months, or a total of \$9,-

530.56, and that according to the provisions of said contract, Plaintiff is entitled to receive such employment, with compensation, throughout his entire life or until he should reach the age of sixty-five years, and that by reason of said discharge Plaintiff has been deprived of said employment to his damage in the sum of \$55,211.52, in addition to the damages accrued to March 25, 1941.

(e) That the Plaintiff and the Brotherhood Carmen of America have repeatedly, since said suspension and discharge, appealed to Defendants to restore Plaintiff to his employment and to compensate him for time lost because of such suspension and discharge, but Defendants have failed and refused and continue to fail and refuse to compensate Plaintiff and restore his employment.

(f) That the Defendant, William Morley, whose true name is Willard T. Morley, was at all times in the Complaint mentioned, General Foreman for the Defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and that he [16] is the person who, as agent of the Defendant corporation, made the decision which caused the discharge and dismissal of Plaintiff.

VIII.

That your Petitioners aver that the following statement, among others, is untrue and was known to the Plaintiff to be untrue at the time the Complaint was prepared and filed, and was set forth and alleged in said Complaint for the sole purpose of

defrauding the Court and these Defendants and so as to defeat and prevent the removal of this action to the United States District Court in and for the District of Nevada, to-wit:

“That the Defendant William Morley was at all times herein mentioned General Foreman for the defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and he is the person who, as Agent of the said defendant corporations, made the decision to so wrongfully and without cause, and did so cause the discharge and dismissal of the plaintiff as aforesaid.”

Also the statement to the effect that the Plaintiff was by the Defendant, William Morley, whose true name is Willard T. Morley, suspended, dismissed and discharged from the service of the Union Pacific Railroad Company, a corporation, and the Los Angeles & Salt Lake Railroad Company, a corporation; also the statement to the effect that Plaintiff, at the time of his alleged suspension, dismissal and discharge, and ever since said suspension, dismissal and discharge, presented himself for employment to said Defendant, William Morley, whose true name is Willard T. Morley; and also the statement to the effect that the Defendant, William Morley, whose true name is Willard T. Morey, failed and refused, and continued to fail and refuse to restore Plaintiff to his employment and to compensate Plaintiff; and also the statement to the effect that the Defendant, William Morley, whose true name is Williard T. Morley, failed and refused to employ or reinstate

Plaintiff and failed or refused to compensate him for services and time lost since said dismissal and discharge; and also the statement to the effect [17] that Plaintiff and the Brotherhood Carmen of America appealed to the Defendant, William Morley, whose true name is Willard T. Morley, to restore Plaintiff to his employment and to compensate him for his time lost because of such suspension and discharge.

In this connection your petitioners affirmatively aver:

That for a long time prior to January 31, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, was employed by Defendant, Los Angeles & Salt Lake Railroad Company, a corporation, as Enginehouse Foreman at Las Vegas, Clark County, Nevada, and that ever since January 1, 1936, said Defendant, William Morley, whose true name is Willard T. Morley, has been employed by the Defendant, Union Pacific Railroad Company, a corporation, as Enginehouse Foreman at Las Vegas, Clark County, Nevada; that the Plaintiff herein was never at any time under the employ of the Defendant, William Morley, whose true name is Willard T. Morley; that on the 25th day of May, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, had no authority or jurisdiction whatsoever to suspend the Plaintiff from his employment by the Defendant corporations, and on the 20th day of August, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, had no au-

thority or jusisdiction whatsoever to dismiss or discharge or to cause to be dismissed or discharge from the service of the said Defendant Railroad Companies, or either of them, the said Plaintiff. That said Defendant, William Morley, whose true name is Willard T. Morley, at no time since the 20th day of August, 1936, has had the jurisdiction or authority to employ or reinstate the said Plaintiff in the service of the Defendant Railroad Companies, or either of them, but, on the contrary, authority and jurisdiction to suspend, discharge, employ, re-employ and reinstate the said Plaintiff, W. L. Olive, in the service of the Defendant Railroad Companies, was vested in officers of said Defendant corporations other than the defendant, William Morley, whose [18] true name is Willard T. Morley.

IX.

That the Defendant, William Morley, whose true name is Willard T. Morley, never was and is not now either a necessary or proper party defendant to this cause.

X.

Your petitioners present herein a good and sufficient bond, as provided by the Statutes in such cases, that they will enter in the District Court of the United States, for the District of Nevada, within thirty days from the date of filing this Petition, a certified copy of the record in said action, and that they will pay all costs which may be awarded by said United States District Court in case the said Court shall hold that this action was wrongfully or improperly removed thereto.

XI.

That prior to the filing of this Petition and said Bond for removal of this cause, written Notice of Intention to file the same, together with a copy of the Removal Bond, was given to the Plaintiff, as required by law.

Wherefore, your Petitioners pray that this Court proceed no further herein, excepting to make an order accepting the Bond presented herewith and directing that a transcript of the record herein be made for filing in the United States District Court for the District of Nevada.

UNION PACIFIC RAILROAD COMPANY,
LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

WILLIAM MORLEY (whose true name
is Willard T. Morley),
Petitioners.

By LEO A. McNAMEE,
FRANK McNAMEE, JR.,
Attorneys for Petitioners. [19]

State of Nevada,
County of Clark—ss.

Willard T. Morley, being first duly sworn, deposes and says: That he is one of the Defendants and one of the Petitioners in the foregoing Petition; that the Defendant, Union Pacific Railroad Company, one of the Petitioners in the foregoing Petition, is a corporation; that the Defendant, Los An-

geles & Salt Lake Railroad Company, one of the Petitioners in the foregoing Petition, is a corporation; that affiant makes this verification for and on behalf of himself and his co-defendants; that affiant has read the foregoing Petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief and as to those matters he believes it to be true.

WILLARD T. MORLEY.

Subscribed and sworn to before me this 8th day of April, 1941.

[Seal] DALTON H. BUCK,
Notary Public.

State of Nevada,
County of Clark—ss.

Leo A. McNamee, being first duly sworn, deposes and says:

That he is one of the Attorneys for the Defendants Los Angeles & Salt Lake Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation; that each of said Defendant corporations is a corporation of the State of Utah, and that all the officers of said Defendant corporations reside outside the County of Clark, State of Nevada, where their said Attorneys reside, and are absent from the said County of Clark, State of Nevada; that affiant has read over the foregoing Petition and that all of the facts therein stated are not within his

knowledge, but that he is informed and believes the same to be true and upon such information and belief states that the same is true.

LEO A. McNAMEE.

Subscribed and sworn to before me this 8th day of April, 1941.

[Seal] DALTON H. BUCK,
Notary Public.

Receipt of a copy of the foregoing Petition this 9 day of April, 1941, is hereby admitted.

(s) HAM & TAYLOR,
Attorneys for Plaintiff.

Filed May 7th, 1941.

O. E. BENHAM,
Clerk.

By M. R. GRUBIC,
Deputy.

[Endorsed]: Filed April 9, 1941. [20]

[Title of District Court and Cause.]

NOTICE OF HEARING ON PETITION FOR
REMOVAL

To: W. L. Olive, Plaintiff above named, and to
Messrs. Ham & Taylor, Esqs., his Attorneys:

You and Each of You, will please take notice that on Wednesday, the 9th day of April, 1941, at 1:50 o'clock P.M., or as soon thereafter as counsel may

be heard, at the Court room of the County Court House, in the City of Las Vegas, Clark County, Nevada, the Defendants above named will move the above entitled Court to make an order removing this cause from this Court to the United States District Court for the District of Nevada.

Dated this 9th day of April, 1941.

LEO A. McNAMEE,

FRANK McNAMEE, Jr.

Receipt of a copy of the foregoing Notice this 9th day of April, 1941, is hereby admitted.

HAM & TAYLOR,

Attorneys for Plaintiff.

Filed May 7th, 1941.

O. E. BENHAM,

Clerk.

By M. R. GRUBIC,

Deputy.

[Endorsed]: Filed Apr. 9, 1941. [21]

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of Nevada, as Surety, is held and firmly bound unto W. L. Olive, in the full and just sum of Five Hundred (\$500.00) Dollars, for the payment of which well and truly to

be made, said Surety binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such that,

Whereas, Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Defendants in the above entitled action, have petitioned, or are about to petition the above entitled Court for the removal of a certain cause therein pending wherein W. O. Olive is the Plaintiff, and the said Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, as well as one William Morley, are defendants, to the District Court of the United States for the District of Nevada, for further proceedings on grounds in said Petition set forth.

Now, Therefore, if the said Union Pacific Railroad Company and Los Angeles & Salt Lake Railroad Company shall enter in such District Court of the United States within thirty (30) days from the date of filing said Petition, a certified copy of the record in such suit and shall well and truly pay all costs that may be awarded by the District Court of the United States if such District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this Undertaking to be executed and its corporate seal [22] affixed by its offi-

cer thereunto duly authorized, this 4th day of April,
1941.

CONTINENTAL CASUALTY
COMPANY.

[Seal] By N. ENLUND,
Its Attorney in Fact.

Countersigned:

L. A. SPRINGETT,
Resident Agent, Box 402, Elko,
Nevada.

The foregoing Bond is hereby approved this 9th
day of April, 1941.

GEORGE E. MARSHALL,
District Judge.

Receipt of a copy of the foregoing Bond this 9th
day of April, 1941, is hereby admitted.

HAM & TAYLOR,
Attorneys for Plaintiff.

Filed May 7th, 1941. O. E. Benham, Clerk. By
M. R. Grubic, Deputy.

[Endorsed]: Filed Apr. 9, 1945. [23]

[Title of District Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon the Petition and Bond of the Defendants for an Order transferring this cause to the United States District Court,

for the District of Nevada, and it appearing to the Court that said Defendants have filed their petition for such removal in due form of law and that said Defendants have filed their Bond, duly conditioned, with good and sufficient surety, as provided by law, and that said Defendants have given Plaintiff due and regular notice thereof, and it appearing to the Court that this is a proper cause for removal to the United States District Court, for the District of Nevada, Now, Therefore, said Petition and Bond are hereby accepted, and

It Is Hereby Ordered and Adjudged that this cause be, and it is hereby, removed to the United States District Court, for the District of Nevada, and the Clerk is hereby directed to make up the record in said cause for transmission to the Court forthwith.

Done in open Court this 9th day of April, 1941.

GEORGE E. MARSHALL,
District Judge.

Filed May 7th, 1941. O. E. Benham, Clerk. By M. R. Grubie, Deputy.

[Endorsed]: Filed April 9, 1941. [24]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE WITH RECORD

State of Nevada,
County of Clark—ss.

I, Lloyd S. Pane, County Clerk of said County of Clark, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for Clark County, do hereby certify the foregoing to be the full, true and correct original record, and the whole thereof, in the above entitled suit heretofore pending in said District Court, being the suit numbered 11746, wherein W. L. Olive is the Plaintiff, and Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, are defendants, said record consisting of the Complaint filed by said Plaintiffs in said suit on the 31st day of March, 1941, the Summons, together with the return thereon, filed March 31, 1941, by the Plaintiff, the Petition for Removal of said suit to the District Court of the United States for the District of Nevada, the Bond for Removal, the Notice of Hearing on Petition for Removal, all filed by said Defendants in said suit on the 9th day of April, 1941, the Order for Removal made at the time of the presentation of said Petition and Bond to the Judge of the District Court, to-wit, on April 9, 1941, and entered of record in said suit on the 9th day of April, 1941, as appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and official seal at my office, in said County of Clark, this 28th day of April, 1941.

[Seal] LLOYD S. PAYNE,
County Clerk and Ex-Officio Clerk of the District
Court of the Eighth Judicial District of the
State of Nevada, in and for the County of Clark.

Filed May 7th, 1941. O. E. Benham, Clerk. By
M. R. Grubic, Deputy. [25]

[Title of District Court and Cause.]

ANSWER

Comes now the Defendants above named and answer Plaintiff's Complaint as follows:

FIRST DEFENSE

Defendants admit the allegations contained in paragraphs I, III, IV, VI, XI and XII of said Complaint.

Defendants admit the allegations contained in paragraph II thereof, except that defendants allege that the true name of said defendant is Willard T. Morley.

Defendants deny the allegations contained in paragraph V of said Complaint.

Defendants deny the allegations contained in paragraph VII of said Complaint, except that Defendants admit that for a period of more than ten years

immediately prior to January 1, 1936, to-wit: Since May 9, 1925, Plaintiff had been employed by Defendant Los Angeles & Salt Lake Railroad Company as a car repairman and Car Inspector at its yards at Las Vegas, Nevada, and in this connection Defendants allege that at the time of Plaintiff's said employment it was agreed between the plaintiff and defendant, Los Angeles & Salt Lake Railroad Company, among other things, as follows:

- (a) That no permanent employment was contracted for and that the term of said employment was subject to the decision of said Defendant;
- (b) That plaintiff during his employment, would abide and be governed by certain rules and regulations promulgated [26] by said defendant, then in force or which thereafter might be adopted, which included said defendants, Hospital Department regulations and said defendant's Rules Governing the Determination of Physical Qualifications of Employees.

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph VIII of said Complaint and therefore deny the allegations in said Paragraph contained.

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph IX of said Complaint and therefore deny all of the allegations therein contained, except that Defendants admit and allege that on November 1, 1934, the Brotherhood Railway Carmen of

America was recognized and authorized bargaining agency for the class and craft of employees collectively, of said Defendant Railroad Companies, respectively, commonly known as carmen.

Defendants deny all of the allegations contained in paragraph X of said Complaint, except that Defendants admit that on the first day of November, 1934, said Brotherhood Railway Carmen of America entered into an agreement with Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, which said agreement set forth the respective rights and duties concerning rates of pay, rules and working conditions of said Defendant Railroad Companies and the class or craft of their employees collectively.

Defendants deny all of the allegations contained in paragraph XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII of said Complaint.

SECOND DEFENSE

I.

Defendants allege that for more than ten years immediately prior to January, 1936, Defendant Los Angeles & Salt Lake Railroad Company, a corporation, was engaged in [27] transporting passengers and property for hire, as a common carrier by railroad from Salt Lake City, in the State of Utah, through the County of Clark, in the State of Nevada, to the City of Los Angeles, in the State of California.

II.

That on May 9, 1925, Plaintiff was engaged by Defendant Los Angeles & Salt Lake Railroad Company, as a carman in its yards at Las Vegas, Nevada.

That on February 25, 1934, the Plaintiff while so in the employ of said Defendant, Los Angeles & Salt Lake Railroad Company, and in the course of said employment and while working upon and about one of said Defendant's passenger cars which had then and there been assigned to one of said Defendant's regular passenger trains to be hauled from Las Vegas, Nevada, to Salt Lake City, Utah, fell from the top of said car and was injured, to-wit, his left arm was fractured. That by reason of said injury, Plaintiff was physically disabled and unable to perform the duties of car man from the time of said injury until May 28, 1938.

III.

That on May 4, 1935, the Plaintiff, in consideration of the sum of \$5,000.00, paid to him, executed and delivered to Defendant Los Angeles & Salt Lake Railroad Company a release of all claims, in writing, which is in the words and figures following:

“Form 222

Union Pacific System

Union Pacific Railroad Company.

Oregon Short Line Railroad Company.

Oregon-Washington Railroad & Navigation Company.

Los Angeles & Salt Lake Railroad Company.

Saratoga & Encampment Valley Railroad Company.

The St. Joseph and Grand Island Railway Company.

St. Joseph Terminal Railroad Company.

Draft No. 3978-MRC. [28]

RELEASE OF ALL CLAIMS

Received of Los Angeles & Salt Lake Railroad Company Five Thousand Dollars (\$5,000.00).

In consideration thereof, I hereby release Los Angeles & Salt Lake Railroad Company and all other companies, partnerships and persons from all claims or causes of action that exist or may hereafter accrue, for damages for any and all personal injuries, including possible unknown injuries, and for complications arising from such injuries or treatment thereof; for loss of services; for medical or other expenses; and for loss and damage to property; growing out of an accident occurring on or about twenty fifth day of February, 1935, at or near Las Vegas, Nevada—resulting in personal injuries to me while a Car Inspector—

The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made.

I Have Read the Foregoing Receipt and Release and Fully Understand the Same. I have read the foregoing receipt and release and fully understand the same.

Dated Las Vegas, Nevada, May 4th, 1935.

WILLARD L. OLIVE

Las Vegas, Nevada

May 4th, 1935

Witnesses: Mary Carol Melton, C. C. Boyer, Jr.,
John R. Hamphill, M. R. Clark. 5/4/35.

IV.

That on May 25, 1938, Plaintiff was notified by Defendant Union Pacific Railroad Company that if he could pass the physical examination required of car men that he would be returned to work as car man in the yards at Las Vegas.

V.

That thereafter, to-wit, on May 28, 1938, Plaintiff passed said physical examination and thereafter was notified to that effect, but said Plaintiff refused to return to his said work, except upon the condition that Defendants compensate Plaintiff for time lost since May, 1935.

THIRD DEFENSE

That Defendant Los Angeles & Salt Lake Railroad Company and the Defendant Union Pacific Railroad Company are each corporations organized and existing under and by virtue of the laws [29] of the State of Utah. That prior to August 20, 1936, each of said Defendant corporations filed a certified copy of its Articles of Incorporation, and a certified copy of all of the Amendments thereto, in the office of the Secretary of State of the State of

Nevada, and ever since prior to August 20, 1936, these Defendant corporations have each kept on file in the office of the Secretary of State of the State of Nevada a certified copy of its Articles of Incorporation, and a certified copy of all of the amendments thereto. That prior to August 20, 1936, said Defendant corporations also each filed a certified copy of its Articles of Incorporation, and of all amendments thereto, as certified by the Secretary of State of the State of Nevada, in the office of the County Clerk of the County of Clark, State of Nevada, in which County the principal place of business of each of said Defendant corporations in the State of Nevada, is located.

That prior to August 20, 1936, each of said Defendant corporations appointed, and have ever since kept and maintained in the State of Nevada, a resident agent upon whom process may be served.

That on or before the 1st day of July of each of the years 1936, 1937, 1938, 1939, 1940, each of the Defendant corporations filed with the Secretary of State of the State of Nevada, a list of its officers and of its Directors of, and a designation of its resident agent, in the State of Nevada, and a certificate of acceptance signed by its resident agent so designated, which said list of officers and designation of resident agent was certified by one of its officers, and upon the filing of each of said lists, paid to the said Secretary of State a fee of \$5.00.

II.

That Plaintiff's cause of action is upon a con-

tract obligation of liability, not founded upon an instrument in [30] writing and that Plaintiff's said cause of action did not accrue within four years from March 31, 1941, the date of the commencement of this action. Wherefore, Plaintiff's cause of action has become, and is, completely barred, by virtue of that portion of Section 8524, Nevada Compiled Laws 1929, reading as follows: "Actions other than those for the recovery of real property, can only be commenced as follows: Within four years: 3. An action upon a contract, obligation or liability, not founded upon an instrument in writing."

LEO A. McNAMEE

Las Vegas, Nevada .

FRANK McNAMEE, Jr.

Las Vegas, Nevada

Attorneys for Defendants.

Receipt of a copy of the foregoing Answer this 6 day of June, 1941, is hereby admitted.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

[Endorsed]: Filed June 9, 1941. [31]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff herein, pursuant to the annexed Stipulation, and leave of Court, hereby

amends his Complaint by substituting for paragraph X of the said Complaint, the following paragraph:

X.

That on the first day of November, 1934, the said Brotherhood Railway Carmen of America entered into an agreement in writing, a copy of which said agreement is hereunto annexed, marked "Exhibit A," and made a part hereof, for the benefit of all members of said Brotherhood Railway Carmen of America with the Los Angeles & Salt Lake Railroad Company and the Union Pacific Railroad Company, which said agreement set forth the respective rights and duties of the said corporations and the said Brotherhood Railway Carmen of America and the individual members thereof with respect to the employment of the members of the said Brotherhood Railway Carmen of America.

Wherefore, plaintiff prays judgment according to the [32] prayer of his original Complaint on file herein.

HAM & TAYLOR

By RYLAND G. TAYLOR
Attorneys for Plaintiff.

**EXHIBIT "A" ATTACHED TO AMENDMENT
TO PARAGRAPH X OF COMPLAINT**

Rule 22: In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible.

Rule 23: Employes who have given long and faithful service in the employ of the company, and who have become unable to handle heavy work to advantage, will be given preference of such light work in their line as they are able to handle.

Rule 38: No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation.

Rule 45: Employes injured while at work are required to make a detailed written report of the circumstances of the accident just as soon as they are able to do so after receiving medical attention. Proper medical attention shall be given at the earliest possible moment and employes shall be permitted to return to work just as soon as they are able to do so, pending final settlement of the case, provided, however, that such injured employes remaining away from work after recovery shall not be held to be entitled to compensation for wage loss after they are able to return to work. All claims for personal injuries shall be handled with the Personal Injury Claim Department.

(Exhibit "A" Is Identical With Plaintiff's Exhibit 2 introduced in evidence.)

[Endorsed]: Filed Feb. 19, 1945. [34]

[Title of District Court and Cause.]

ANSWER TO AMENDMENT TO COMPLAINT

Come now the Defendants above named and answer Plaintiff's Amendment to Complaint, as follows:

I.

Defendants deny all of the allegations contained in paragraph X of said Complaint, as amended pursuant to Stipulation dated February 16, 1945, except that Defendants admit that on the first day of November, 1934, said Brotherhood of Railway Carmen of America entered into an agreement in writing, a copy of which is annexed to said Amendment to Complaint, marked Exhibit "A," and made a part thereof, with Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, which said Agreement set forth the respective rights and duties concerning rates of pay, rules and working conditions of said Defendant Railroad Companies and the class or craft of their employees collectively.

LEO A. McNAMEE

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Defendants.

Receipt of a copy of the foregoing Answer to Amendment to Complaint, this 21 day of February, 1945, is hereby admitted.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 26, 1945. [35]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the Plaintiff in the above entitled Court and cause, as of the 5th day of March, 1945, and moves the Court for an order striking from the Answer in the above entitled Court and cause (a) Paragraph III of the Second Defense and (b) the entire Third Defense, upon the ground and for the reason that the said matter is immaterial and does not constitute a defense or defenses and the same is surplusage.

Dated this 24 day of February, 1945.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

Receipt of a copy of the foregoing Motion is admitted this 24 day of February, 1945.

McNAMEE & McNAMEE

By LEO A. McNAMEE

Attorneys for Defendants.

In the District Court of the United States,
In and For the District of Nevada

No. 160

Before: Hon. Ben Harrison, Judge, Presiding.

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation, and WILLARD T. MORLEY,

Defendants.

TRIAL

Be It Remembered, That the above-entitled cause came on regularly for trial before the Court, sitting with a jury, on Monday, the 19th day of March, 1945, at 10:00 o'clock A.M., at Las Vegas, Nevada, Hon. Ben Harrison, Judge, presiding.

Appearances: Ham & Taylor, by Ryland G. Taylor and A. W. Ham, Attorneys for Plaintiff. McNamee & McNamee, by Leo McNamee, Attorneys for Defendants.

The following proceedings were had:

Opening statements by respective counsel.

The Court: So we may clarify the atmosphere—there has been some reference to connection between the Union Pacific and Salt [48] Lake Railroad—

Mr. McNamee: That is not a question in the case, your Honor.

The Court: It is just a question whether or not this man is improperly discharged. So that is the question before the jury, and if so, the amount due him.

Mr. Taylor: And I think it is agreed if there is a sum due, it is due from the Union Pacific, by virtue of its succeeding to the Los Angeles & Salt Lake Railroad. Is that right?

Mr. McNamee: That is correct.

Mr. Taylor: I have a paper entitled in this court, "Request for Admission of Facts," served and signed the 9th day of February, 1945, and request that that be marked Plaintiff's Exhibit 1 and introduced into evidence.

Mr. McNamee: No objection.

Clerk: Plaintiff's 1.

Mr. Taylor: I have here a document entitled, "Schedule of Rules Governing the Working Conditions of Employees" etc., of the Union Pacific System, and request that that be marked Plaintiff's Exhibit 2 and introduced into evidence.

Mr. McNamee: No objection.

The Court: So marked.

Clerk: Plaintiff's 2.

Mr. Taylor: I desire to read from these exhibits.

The Court: May it be stipulated, gentlemen, these exhibits, [49] either party may read any part they wish to call the jury's attention to. Neither one wants to read the whole book.

Mr. McNamee: As I understand, Exhibit 1 is "Request for Admission of Facts."

Mr. Taylor: That is right.

Mr. McNamee: And Exhibit 2 is the contract?

Mr. Taylor: That is right.

Mr. McNamee: That is part of Exhibit 1?

Mr. Taylor: No, Exhibit 2 is the book of rules.

The Court: Do you wish to withdraw your Exhibit 2 and attach it to Exhibit 1?

Mr. Taylor: I think the way it is, your Honor. It has been offered and admitted now as Exhibit 1.

The Court: Any part of the admissions you wish to read to the jury at this time?

Mr. Taylor: At this time I believe not, sir. I think we can forego that until the argument, your Honor.

Mr. McNamee: At this time, if your Honor please, the defendant has certain admissions and I wondered if we should put ours in now?

The Court: Let the plaintiff finish his case first.

MR. W. L. OLIVE,

the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, Mr. Olive? [50]

A. Willard L. Olive.

Q. You are the plaintiff in this action?

(Testimony of W. L. Olive.)

A. Yes.

Q. How old are you? A. Forty-four.

Q. What date?

A. I will be 44 the 11th of November this year.

Q. Then you are 43 years old at this time?

A. Yes.

Q. When did you start to work in the railroad business, or when did you start to work?

A. Just after I left high school, I think.

Q. How old were you then?

A. About 16.

Q. Where were you?

A. At Pocatello, Idaho.

Q. What character of work did you start in to do?

A. You mean the various branches I have worked in?

Q. Anything that you did during your life?

A. I started out as office boy?

Q. For whom?

A. For the Union Pacific, and then I went into the stationary department.

Q. For whom?

A. For the railroad, for the Union Pacific; then the store department for the Union Pacific and then for the car shop store [51] department for the Union Pacific; then I transferred to the car department as a car inspector. I started out as a repair man and worked my way up to a car inspector.

Q. Tell the years during which you worked and the places.

(Testimony of W. L. Olive.)

A. I believe Pocatello and Las Vegas are the only two places I worked for the Union Pacific.

Q. How long did you work in Pocatello?

A. From 1916 to about 1921.

Q. When did you come to Las Vegas and start to work for the Los Angeles & Salt Lake?

A. I came to Las Vegas in 1923 and started to work in the store department here and from there transferred into the car department I think—there was a little lapse of service there, but I think 1925 was my shop seniority date.

Q. Then you worked continuously for the Los Angeles & Salt Lake car department up to 1934, is that true? A. That is true.

Q. And at that time you went out of the service for a period, is that right? A. Yes.

Q. I mean by going out of the service, you actually left the shop for a while, is that true?

A. That is true.

Q. What was the occasion for your being off from your work?

A. I was injured by a fall from a car that was improperly spotted at the depot platform. [52]

Q. And were you given leaves of absences during the interim during which you were off?

A. Yes, sir.

Q. There was, I believe, later on a settlement made for your injury, wasn't there?

A. Yes, sir.

Q. But in the course of that settlement your employment with the railroad was not terminated?

(Testimony of W. L. Olive.)

A. No.

Q. You continued on to get your leave of absence and you continued to endeavor to restore your health so as to enable you to return to your employment, is that right? A. That is right.

Q. When, after that period during which you were away from work a while, when did you later report back for work?

A. I reported back for work December 18, 1935.

Q. Were you given employment at that time?

A. No, sir.

Q. What excuse, if any, was given you, what reason was given you, for not putting you to work, if any?

The Court: Let us find out who he talked to.

Mr. Taylor: Very well, sir, thank you.

Q. Who at that time, if any one, did you apply to to return to work?

A. Oh, my immediate superior was Mr. Maydahl.

Q. And tell what happened. [53]

A. He was the car foreman here at that time and he recommended that I be examined by a local doctor, which I did, and—

Q. Who was the local doctor?

A. Dr. Hale B. Slavin.

Q. And go ahead, tell what happened.

A. He passed me for my examination with the exception of a few points high blood pressure. However, he recommended that it would be a borderline case and told me to come back later.

Q. Did you go back later?

A. I did.

(Testimony of W. L. Olive.)

Q. When was that? A. At various times.

Mr. Taylor: Excuse me. With permission of Court and counsel, this has been a long time ago and if he might be permitted to refresh his memory from notes he has, I would appreciate it.

Mr. McNamee: I have no objection if the notes were taken at the time.

Mr. Taylor: Well, they were made up later from memoranda.

The Court: Was the memorandum made at the time?

Mr. Taylor: Yes sir. This memorandum is made from correspondence and notes—

The Court: He has a right to refresh his memory.

A. There were so many dates that I can't remember them all, but I was examined January 3, 1935.

Q. Where at and with what result? [54]

A. In Salt Lake.

Q. Who examined you then?

A. The chief surgeon, Dr. Joseph Landenberger. He passed me for duty.

Q. When was that? A. January 3, 1935.

Q. Where was that at?

A. That was in Salt Lake City.

Q. And was there any subsequent examination?

The Court: You say he passed you?

A. Yes sir. Yes, he told me at the time to take a routine examination in Las Vegas from our local doctor, which I did. That was May 20, 1935.

(Testimony of W. L. Olive.)

Q. What was the result of that?

A. That was the same as the first examination I took from Dr. Slavin. He had a few points high blood pressure again.

The Court: In other words you didn't pass?

A. No sir.

Q. What was that answer?

A. Well, if I may elaborate it a little. He recommended that my case be considered a borderline case and told me to report later.

Q. Who was that, Dr. Slavin?

A. Dr. Slavin.

Q. On May 20, 1935? A. Yes sir. [55]

Q. He told you to report where?

A. Oh, if I can beg the Court's pardon here, I have made a mistake. My first examination was May 20, 1935, from Dr. Slavin and he advised me under the circumstances to take an extended trip and see if I couldn't build up my arm, which I did. Then on returning from this trip, I stopped in Salt Lake City and was examined by Dr. Landenberger on the date I gave you, October 8, 1936; then I was examined on November 20, 1935, here by Dr. Slavin.

Q. Pause there a minute. On October 8th Dr. Landenberger examined you? A. Yes.

Q. 1935? A. Yes.

Q. What were his findings?

A. He passed me for live track duty.

Q. What is that?

A. It means that you must be physically fit and

(Testimony of W. L. Olive.)

have good eyes and good hearing and be able to perform the work of car inspector.

Q. Physically in fine shape?

A. Yes sir.

Q. And he passed you at that time, is that true?

A. Yes sir.

Mr. McNamee: He passed you for not live truck duty, but dead truck duty, didn't he? [56]

A. No, live track duty. I was a car inspector. It was live track work.

Mr. McNamee: All right.

Q. (Mr. Taylor) Then what was done subsequent to that?

A. Then I was examined again on May 23, 1936, by Dr. Slavin and he held my two or three points blood pressure against me. However, at that time I was examined by a city physician, Dr. Balcomb here, who assured me my heart—

Mr. McNamee: I object to what Dr. Balcomb testified to.

The Court: Yes.

Q. What was done with Slavin's findings at that time, on May 23rd, wasn't it, that he examined you?

A. Yes sir. He held a few points high blood pressure—

The Court: In other words, he didn't pass you, isn't that correct?

A. I don't know how you determine it.

The Court: In other words, he didn't give you clearance to go back to work?

A. No.

(Testimony of W. L. Olive.)

Q. Did he tell you you could go back to work or your condition was such that you could go to work?

Mr. McNamee: Objected to—

The Court: He testified to the fact.

Mr. McNamee: I will withdraw the objection.

(Question read.)

Mr. McNamee: I object on the ground it is leading [57]

The Court: Well, it is leading, but I will let him answer just the same.

A. Dr. Slavin told me that he would recommend in writing that my case was a borderline case and again write to Dr. Landenberger in Salt Lake City, who was the chief surgeon.

Q. He recommended your return to service?

A. He seemed in favor of it.

The Court: I will strike that out as conclusion, "he seemed in favor it." That is his conclusion.

A. And I was examined again on October 22, 1937, by Schuler Fagen who was chief surgeon in Los Angeles, replacing Dr. Landenberger. That was October 22, 1937, and he passed me for live track duty. And then I was examined again on May 27, 1938, by the Union Pacific medical staff in Los Angeles and in the presence of witnesses of the B. R. C. of America, that is the Brotherhood of Railway Carmen, and was again passed for live track duty.

Q. Did you explain—that was May 27, 1938?

A. Yes sir.

(Testimony of W. L. Olive.)

Q. What happened on October 22, 1937? Wasn't that examination in Los Angeles, or was it?

A. Yes sir.

Q. And what happened in '37, October 22, 1937?

A. I was examined by Dr. Schuler S. Fagen and he passed me for live track duty.

Q. And were you examined at any time by independent medical men of your own, other than the company's doctors? [58] A. Yes sir.

Q. Who examined you?

A. I was examined on May 23, 1936, by Dr. Balecolm.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 3 a stipulation reading as follows:

"It Is Hereby Stipulated by and between the parties hereto and their respective counsel:

"That Dr. R. D. Balecolm is now and at all times hereinafter mentioned was a qualified physician and surgeon and on duty and in the practice of his profession at the Las Vegas Hospital in Clark County, Nevada.

"That if he were present and sworn to testify in this case, he would testify as follows:

"That on May 23, 1936, he made a physical examination of W. L. Olive, the plaintiff in this action, to determine his physical conditions. That at that time he found the plaintiff in normal health, with a blood pressure of 130. That his heart was 100

normal and sound and that he is physically qualified for any character of physical exertion.' "

(Testimony of W. L. Olive.)

"Dated this 19th day of March, 1945.

HAM & TAYLOR

RYLAND G. TAYLOR

Attorneys for Plaintiff.

LEO A. McNAMEE, Esq., and

FRANK McNAMEE, Esq.,

Attorneys for Defendant

By LEO A. McNAMEE."

May that be admitted as Exhibit 3?

The Court: Exhibit 3.

Clerk: Plaintiff's 3.

Q. Now immediately following that did you get any further physical [59] examination—or, to refresh your memory, I direct your attention to a time when the railroad car came through—I don't know what to call that car—but they have doctors on it. Do you recall the incident?

A. I recall the incident that I was examined by the railroad doctor, Dr. Brown, I believe it was.

Q. About what time was that?

A. I can't give the date on that.

Q. Approximately?

A. About November, 1936, I think.

Q. That is the best of your recollection?

A. That is the best I recollect.

Q. And Dr. Brown was a medical officer or physician on that car? A. Yes sir.

Q. What was his finding?

A. He passed me for live track duty.

Q. Now I should like to take you back, Mr.

(Testimony of W. L. Olive.)

Olive, to the time you first, after you were off during your sickness, that you returned and applied for employment. That was in December of 1935, wasn't it? A. Yes sir.

Q. What happened then?

A. I was subject to what they call tossing duty, from one department to another, as I can see it.

Q. I am afraid that is conclusion. Now will you tell what happened and what was said by the railroad officials, when and [60] who said it, who you talked with and what was said by you?

A. I talked with Maydahl, Berry and Knickerbocker. These were all railroad officials.

Q. Who was Maydahl?

A. Car foreman.

Q. Who was present during the conversation?

A. I believe just the two of us.

Q. And when was it?

A. That was December 18, 1935.

Q. Go ahead and tell what happened.

A. I asked each of them to return to work and each in turn would refer me to the medical department. Then if I took it up with the medical department they would refer me back to the mechanical department and I didn't accomplish anything, so there isn't anything I can tell you about it.

Q. Who was Berry?

A. Berry was the master mechanic.

Q. Where is his place?

A. On the line, I think. He travelled up and down.

(Testimony of W. L. Olive.)

Q. And did you talk to him about the same time?

A. Yes sir.

Q. What did he say to you?

A. He referred me to the medical department.

Q. And did you talk to Mr. Knickerbocker?

A. Yes sir.

Q. When was that? [61]

A. That was shortly after I talked to Mr. Berry.

Q. Well, when did you talk to Mr. Berry? Give us a date, if you can, as nearly as you can.

A. I couldn't give you an exact date.

Q. Well, be approximate.

A. About January, 1936.

Q. Who was Mr. Knickerbocker?

A. He is superintendent of motor power and machinery.

Q. And what did he do?

A. He referred me to the medical department.

Q. And did you speak to any one else?

A. On quite a number of occasions.

Q. Who that was connected with the railroad company did you speak to?

A. The officials who were in charge. I saw each one of them as I could and on the dates that was convenient to them and those dates are confusing to me. I don't know the dates, but I contacted all the officials I could possibly contact and gained no results from them whatsoever.

Q. Did the company ever offer to return you to work?

A. No, but if I may make that a little more

(Testimony of W. L. Olive.)

clear—I was offered to be reinstated if I would waive all claim for back pay, which I figured was due me.

Q. When was that offer made?

A. That was made by Mr. Norton, who was superintendent of motor power and machinery. [62]

Q. Do you remember the date?

A. I don't know.

Q. To refresh your memory, you were also notified—by the way, who was Mr. Eney, Thomas J. Eney?

A. He was the general chairman to whom the case was given at a later date.

Q. Did Mr. Eney ever notify you to that effect?

A. Well, I think the case was given to the Brotherhood of Railway Carmen. When I found I couldn't do anything with it, I turned the case over to them and there was subsequent correspondence dealing with it and I believe the meeting that you spoke of while Mr. Eney did have charge of the case.

Q. Did you ever get a telegram from Mr. Eney relating to your returning to work?

The Court: He is a representative of the Carmen?

Mr. Taylor: He was the representative.

The Court: But he was plaintiff's representative?

Mr. Taylor: I am fearful he was.

The Court: On what theory could a telegram

(Testimony of W. L. Olive.)

from a representative of the organization be admissible?

Mr. Taylor: I was going to show it to counsel and he can consider it—

Q. Have you the telegram from Mr. Eney?

(Telegram produced and shown to opposing counsel.)

Mr. Taylor: Well, I will pass on that.

Q. Mr. Olive, I asked you if you were ever offered, the railroad [63] ever offered, to return you to work and you stated only on the basis that you waive any accrued compensation at that time. You indicated that some conversation was had with Mr. Norton. Who was Mr. Norton?

A. He was the general superintendent.

Q. About what date was that, if you recall?

A. I can't recall the date without referring to my file.

Q. Will you please fix the date if you can accurately and truthfully fix the date.

A. I am not a very good bookkeeper either. I have a letter here from Mr. T. J. Eney to Mr. Thurmond, or telegram, "Norton requests—

Mr. McNamee: We object on the ground it is hearsay.

The Court: You can use your file for the purpose of refreshing your memory, but telegrams from your own representatives would not be admissible. You can use your file for the purpose of refreshing your memory as to date.

A. That date was December 28, 1937.

(Testimony of W. L. Olive.)

Q. Did you talk to Norton on or about that time?

A. Yes sir, in the presence of the Local Joint Protective Board Committee of Railroad Carmen.

Q. And what did Norton say for and on behalf of the company, if anything, relating to your returning to work?

A. He said that he would reinstate me with the provision that I sign a waiver disclaiming any back pay due me. [64]

Q. But prior to that time you had been discharged, hadn't you?

A. I was discharged—I will have to look that up too.

Q. If you will.

A. I was discharged October 20, 1936.

Q. How was that discharge communicated?

A. The car foreman just gave me a slip of paper and said I was discharged.

Q. Have you that slip of paper?

A. I don't have the slip here, Mr. Taylor, but I have a photostatic copy of the original.

Q. May I see that copy? Do you know where the original is?

The Court: Gentlemen, it is 12 o'clock and I think at this time we will take our noon recess until 2:00 o'clock and I wish to admonish the jury at this time not to discuss this case among yourselves, allow any person to discuss it with you, express or form any opinion as to the merits of the case until it is finally submitted to you. This admonition is not a mere formality, but it is for the purpose of

(Testimony of W. L. Olive.)

having you keep your mind open until the case is finally submitted to you. With that admonition I will excuse the jury.

(Recess taken at 12:00 noon.) [65]

Afternoon Session—March 19, 1945

2:00 p. m.

Presence of the jury stipulated.

Mr. Olive resumed the witness stand on further direct examination by Mr. Taylor.

(Last question and answer read.)

Q. That slip of paper referred to the memorandum regarding your discharge, is that true?

A. Yes sir.

Q. I call your attention to this paper here and ask you if that is the paper you have reference to?

A. Yes sir.

Q. This is the original notice that you received?

A. Yes sir.

Mr. Taylor: I offer this in evidence and ask that it be marked.

The Court: It may be marked next in order.

Mr. McNamee: No objection.

Clerk: Plaintiff's 4.

Mr. Taylor: (Reads) "Las Vegas, Nevada.

10-20-36

"Mr. W. L. Olive: This is to advise you that you have been disqualified from returning to work as carman.

"Maydahl."

Q. Now you stated, Mr. Olive, from the time of

(Testimony of W. L. Olive.)

your injury on until May, 1936, that you had a series of leaves of absence, is that true?

A. Yes sir.

Q. Have you those leaves of absence? [66]

A. I do.

The Court: Is there any question about that? I think counsel for the defendant also stated a number of leaves of absence.

Mr. McNamee: I would like to have them in evidence, if your Honor please. There is no question about it, but I would like to have it in evidence.

Mr. Taylor: We have leaves of absence dated February 25, 1934, to August 25, 1934, and one February 25, 1935, to August 25, 1935; one August 25, 1935, to February 25, 1936; one February 25, 1936, to May 25, 1936. We offer these as one exhibit, if the Court please.

Mr. McNamee: No objection.

The Court: Admitted next in order. What is the last date leave of absence expired?

Mr. Taylor: May 25, 1936.

Clerk: Plaintiff's 5.

PLAINTIFF'S EXHIBIT No. 5

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nev. June 11, 1934

Mr. J. F. Long, Los Angeles, Cal.

I request leave of absence of 6 months
day from Feb. 25th 1934 to August 25th 1934.

(Testimony of W. L. Olive.)

Account: (State reason if request is for leave of absence) Personal injury.

My work is in arrears. I entered the service 5-9-25.

Last Vacation days to 19.....

Last Leave days to 19.....

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be 1808 Sundry, Long Beach, Cal or 216 Carson str., Las Vegas, Ne.

(Testimony of W. L. Olive.)

Occupation: Ld Car Inspector; department or bureau: MP&C.

W. L. OLIVE

Signature

Condition of work, service and absence records correct. I recommend request be granted.

Recommended:

J. R. ORVGARD

Car Foreman

L. H. ANDERSON

For Gen'l Claim Agent

J. F. LONG

Supt. M. P. & Mach'y.

Approved:

O. JABELMANN,

Asst. Genl. Supt. Motive

Power & Machinery [40]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nevada. January 29, 1939

Mr. O. Jabelmann, Asst. GSMP&M.

I request Leave of Absence of 6 Month x Day, from February 25th, 1935 to August 25th, 1935.

Account (State reason if request is for leave of absence): Personal injury.

(Testimony of W. L. Olive.)

My work is not in arrears. I entered the service April 1925.

Last vacation days to 19.....

Last leave 6 mos., days to 2-25-34.

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

(Illegible)

General claim agent

My address during leave will be 216 Carson Street, Las Vegas, Nevada.

(Testimony of W. L. Olive.)

Occupation: Lead Car Inspr.

Department or Bureau: LV Car Dept.

W. L. OLIVE
Signature

Condition of Work, Service and Absence Records
correct—I recommend request be granted.

Recommended:

J. R. ORVGARD
Car Foreman

J. F. LONG
SMP&M

Approved:

O. JABELMANN
Asst. GSMP&M [41]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, 7-12-1935

Mr. O. Jablemann, AGSMP&M, Omaha, Nebr.

I request Leave of Absence of 6 Months, Aug. 25,
1935, to Feb. 25, 1936.

Account: (State reason if request is for leave of
absence) Parents Illness & Injury to Arm.

My work is Not in arrears. I entered the service
5-9-25.

(Testimony of W. L. Olive.)

Last Vacation Days to 19..

Last Leave 6 Months, Days to Aug. 25, 1935.

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be Box 802, Las Vegas, Nev.

Occupation: Lead Insp. Department or Bureau:
L. V. Car.

WILLARD L. OLIVE

Signature

(Testimony of W. L. Olive.)

Condition of Work, Service and Absence Records
correct—I recommend request be granted.

Recommended:

W. MAYDAHL
Car Foreman

J. F. LONG
Supt MP&M

Approved:

A. L. LOONEY
Supt. Car Dept. [42]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nev., Feb. 24, 1936

A. L. Looney, Supt. Car Dept., Omaha, Nebr.

I request (Vacation) (Leave of Absence) Feb.
25th, 1936, to May 25th, 1936.

Account: (State reason if request is for leave
of absence) Illness.

My work is Not in arrears. I entered the service
April, 1925.

Last Vacation Days to 19..

Last Leave 180 Days to Feb. 25, 1936.

I understand that my Union Pacific group insurance
will be cancelled if I am on leave of absence
for more than 90 days for reasons other than sick-

(Testimony of W. L. Olive.)

ness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be 116 Carson Str., Las Vegas.

Occupation: Ld Car Insp.

Department or Bureau: LV Car.

W. L. OLIVE
Signature

Condition of Work, Service and Absence Records correct—I recommend request be granted.

Recommended:

W. MAYDAHL
Car 4 Man

(Testimony of W. L. Olive.)

J. F. LONG

Supt. M.P. & Mach'y

Approved:

A. L. LOONEY

Supt. Car Dept. [43]

Q. There is a period of time, Mr. Olive, August 25, 1934, to February 25, 1935, did you have a leave of absence during that period?

A. Those dates again?

Q. August 25, 1934, to February 25, 1935.

A. No.

Q. Didn't you have a leave of absence during that period?

Mr. McNamee: We will stipulate that he did.

Mr. Taylor: There is a missing link in there and I want to [67] show that one was lost, but it is stipulated by counsel there was one for that period.

Mr. McNamee: It is stipulated.

Q. Are you a member of the Brotherhood Railway Carmen of America? A. Yes, sir.

Q. How long have you been a member of that organization?

A. Since June 3, 1934, when the charter was admitted to this Local.

Q. And I direct your attention to Plaintiff's Exhibit 2, Rules, and ask you if you are familiar with those rules? A. Yes, sir.

Q. At that time can you say whether or not in

(Testimony of W. L. Olive.)

November 1, 1934, can you say whether or not the Brotherhood Railway Carmen of America was authorized to enter into agreements and bargain for you and the members of the organization with the railroad system? A. Yes, sir.

Mr. McNamee: That is admitted in the pleadings, I think, that this bargaining agreement was entered into between the railroad companies and the Brotherhood.

Mr. Taylor: Yes, I guess you are right. I had overlooked that. That is right; thank you.

Q. Mr. Olive, are you acquainted with the provisions of the Railroad Retirement Act of 1935?

A. Yes, sir. [68]

Q. Were you at the time of your discharge so familiar with that Act, the provisions of it?

A. Yes, sir.

Q. Will you state whether or not the benefits of that Act are regarded as a valuable incident of the employment?

Mr. McNamee: Objected to as calling for conclusion of the witness.

Mr. Taylor: If your Honor please, I asked him if it was so regarded. The purpose of this is not to show damages resulting from his being cut off from his right to retirement, because we haven't pleaded that, and I don't know why we didn't plead that as damages, but we did not, but there is a question as to the duration of this contract, and in determining the duration of this contract, it is necessary to determine and decide all elements and questions

(Testimony of W. L. Olive.)

involved. If the Railroad Retirement Act had certain benefits that would ultimately accrue to a man for lengthy and loyal service to the railroad, it is my opinion proper to consider that, to the end that we might determine whether or not—

The Court: Counsel, you have stated that you did not plead.

Mr. Taylor: That is right.

The Court: Then don't you think it would be improper to bring that before a jury to cause them to consider something that is not before them?

Mr. Taylor: No, sir.

The Court: The Court so considers and instructs the jury [69] to disregard comments of counsel concerning matter pleaded because you have asked for damages solely on the basis of lost time as I understand.

Mr. Taylor: That is right, sir, and that is why—

The Court: I consider it highly improper and instruct the jury to disregard it.

Mr. Taylor: Very well, sir.

Q. Mr. Olive, at the time of your discharge what were you doing at that time?

A. I was lead car inspector.

Q. For the Union Pacific, Los Angeles & Salt Lake? A. Yes, sir.

Q. What was the rate of pay that you were receiving?

A. I received five cents an hour over the inspector's rate, which was \$6.32 a day.

(Testimony of W. L. Olive.)

The Court: Then you were receiving \$6.37 a day? A. Yes, sir.

The Court: Eight hour day? A. Yes, sir.

The Court: How many days a week.

A. Five days a week at that time, sir.

Mr. Taylor: That isn't clear to me. You said you were receiving five cents more than car inspector?

The Court: He explained it, counsel, by saying the rate was \$6.32, so he was receiving \$6.37 [70] for 8 hours' work, is that correct?

A. I didn't figure it out. \$6.32 plus 5 cents an hour.

The Court: You mean 5 cents an hour, 40 cents a day?

Q. That would be \$6.72, is that correct?

A. That is right, sir.

Q. How many days a week did you say you worked? A. Five days a week.

Q. What is the normal period of work? Five days, is that normal or do the carmen work more days per week on occasions?

Mr. McNamee: Objected to. I think the criterion is what was the number of hours worked at the time of his alleged unlawful discharge.

The Court: What is normal, I don't know how anybody can answer that question. All he can do is to take the facts when he was working and when he might be working, what the records show.

Mr. Taylor: If your Honor please, am I permitted to show that subsequently the carmen worked longer hours during the period?

(Testimony of W. L. Olive.)

The Court: I think I will take judicial notice of that fact, that during the last few years a man has worked longer hours. I think that is a matter that we all recognize, during the war period a man has worked longer hours than usual. Counsel does not dispute that statement of the Court?

Mr. McNamee: No, I don't think so. [71]

The Court: You recognize that, too?

Mr. McNamee: That is right.

Mr. Taylor: I don't want to argue the case now, but in order that the jury might get to the import of this question, I would like to read from Rule 27 of the Rules, 37 and 38. I am now reading from Plaintiff's Exhibit 2, the rule or agreement:

"Rule 37. No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

"Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad

(Testimony of W. L. Olive.)

ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation."

Q. Mr. Olive, I will ask you if prior to your discharge were you ever advised by the railroad, or any of its officers, of any charge pending against you? A. No, sir.

Q. Ever or at all? A. No, sir.

Q. Were you ever given an opportunity to present in your behalf witnesses? [72]

A. No, sir.

Q. Were you ever given an opportunity to appear before any investigating committee or board by counsel? A. No, sir.

Q. Have you received any compensation from the railroad for services or at all since this said dismissal? A. No, sir.

Q. Was any investigation, so far as you know, held relating to the subject of your discharge?

A. No, sir.

Q. After your discharge did you report the matter to the Local Committee of the Union?

A. Yes, sir.

Q. Do you know what disposition was made of that, if any?

A. Well, failing to obtain any satisfaction myself, I turned it over to the Joint Protective Board Committee to see what they could do.

Q. And when was that, if you recall?

A. With permission, I will have to look at the date.

(Testimony of W. L. Olive.)

Q. Will you refresh your memory if you can?

A. It was about November, 1936, I think.

Q. But after the discharge?

A. I am not certain. I think that is about right, November, '36.

Q. I will ask you if you know whether or not carmen, members of your crews, have had a raise of pay since your discharge? [73] A. Oh, yes.

Q. Do you know what the present scale is?

A. I don't, sir.

Mr. Taylor: Do you know, Leo?

Mr. McNamee: No, I don't.

Mr. Taylor: May it be stipulated I will offer evidence on it a little later?

Mr. McNamee: Well, I might object, but I have no objection to its being offered out of order.

Mr. Taylor: You can take the witness.

Cross-Examination

By Mr. McNamee:

Q. Calling your attention to Plaintiff's Exhibit No. 4, I will ask you to state whether or not that is the only notice that you received in regard to your so-called discharge? A. Yes, sir.

Q. Now that states, it is addressed to you and it is signed by Mr. W. Maydahl? A. Yes, sir.

Q. And it states: "This is to advise you that you have been disqualified from returning to work as carman," does it not? A. Yes.

Q. Did any officer of the railroad company ever tell you that you were discharged?

A. Yes, that was my discharge.

(Testimony of W. L. Olive.)

Q. This is the only thing—doesn't this say that you were only disqualified from returning to work as a carman? [74]

The Court: It speaks for itself. Don't argue.

Q. You stated that you discussed this matter with Mr. Fred Knickerbocker, is that correct?

A. Yes, sir.

Q. And at that time Mr. Knickerbocker was the general manager of Los Angeles & Salt Lake Railroad Company, was he not? A. Yes, sir.

Q. And isn't it a fact that Mr. Knickerbocker told you that you could return to work as soon as you could pass the necessary medical examination, or words to that effect? A. If you——

The Court: Answer the question.

A. Well, I had several examinations that allowed me to go back to work.

Q. I know, but didn't Mr. Knickerbocker advise you that you could go back to work as soon as you could pass the necessary physical examination?

A. No, I don't think he did.

Q. What did he tell you?

A. He told me that I was discharged and that Mr. Maydahl had taken the necessary steps.

Q. Mr. Knickerbocker told you that you were discharged and Mr. Maydahl had taken the necessary steps? A. Yes.

Q. Are you sure of that? A. Yes, sir. [75]

Q. Did you ever talk the matter over with Mr. Burnett? A. I don't believe I have, sir.

Q. Did you ever talk it over with Mr. Norton?

(Testimony of W. L. Olive.)

Q. Yes, sir.

Q. Did Mr. Norton ever tell you you could go back to work as soon as you could pass the physical examination? A. No, but may I qualify that?

Q. Yes.

A. If I would release my contention for any back claim he would restore me to work, yes.

Q. That was his condition, if you would release your contention for any back pay, he would let you go back to work, is that correct? A. Yes.

Q. About when was that?

A. I don't remember the exact dates, but I think I looked it up a while ago.

Q. Do you have any memorandum there that would help you fix the date?

A. Yes, sir. (Witness examines papers) December 28, 1937.

Q. When did you first submit your case to the Local Protective Board of the labor organization, the Brotherhood Railway Carmen of America?

A. Right after I was discharged.

Q. When was that?

A. In November, 1936. [76]

Q. And by discharge you mean when you were disqualified for service, at the time you received that notice?

A. When I was discharged, yes, sir.

Q. That was in October, 1936?

A. Yes, sir.

Q. And then it was in November that you submitted the matter to the local board?

(Testimony of W. L. Olive.)

A. Yes, sir.

Q. To whom did you submit it, which member of the local board?

A. The Joint Protective Board Committee, Mr. Thurmond, Mr. Urey and Mr. Jerry.

Q. Were you present at any conferences of that Board? A. Yes.

Q. Were any of the railroad officials present?

A. Not at the time I turned my case over to the Board, no.

Q. Do you know whether or not the Board took your case up with any of the railroad officials?

A. They did and they endeavored to handle it for me.

Q. And they did take it up with the railroad officials? A. Yes, sir.

Q. Which officials did they take it up with?

A. All of them, I presume.

The Court: You say you presume. You don't know who they took it up with, do you, except what somebody told you?

A. That is right. [77]

The Court: It is hearsay, counsel.

Q. Are you acquainted with Mr. Thomas J. Eney? A. Yes, sir.

Q. And during 1937 and 1938 Mr. Eney was the general chairman of the Local Protective Board of the Brotherhood Railway Carmen of America, was he not? A. Yes, sir.

Q. He was the general chairman for the Union Pacific System, is that right? A. Yes, sir.

(Testimony of W. L. Olive.)

Q. Did you ever submit your case to him and ask him to take the case up for you? A. Yes, sir.

Q. How many discussions did you have with Mr. Eney? A. Personally?

Q. Yes. A. One.

Q. Where was that?

A. In the Sal Saveg Hotel when I gave him the case.

Q. Did you ever hear from Mr. Eney after that?

A. On several occasions, all by correspondence.

Q. Do you have any of that correspondence with you? A. Yes, sir.

Q. May I see it?

A. If you wish, sir. The entire file of the case is there.

Q. May I have those? [78]

The Court: He has asked you to produce any correspondence you have with Mr. Eney at this time. It is up to counsel.

Mr. Taylor: We have no objection. In fact, I will stipulate now these are copies of which we have, that is the whole case, that went up to Eney. We will stipulate now that it goes into evidence.

Q. Were you ever present when any of the members of the Committee and officials of the railroad company discussed your case?

A. On one occasion.

Q. When was that?

A. At the time Mr. Norton—

Q. At that time that was in 1937, I believe you stated? A. The date is there, yes, sir.

(Testimony of W. L. Olive.)

Q. Yes, December, 1937, that was the time when Mr. Norton offered to let you go back to work, provided you waived your claim for back compensation, is that right?

A. With that provision, yes, sir.

Q. Were you present at any other conferences between the members of the organization and the railroad company officials? A. No.

Q. Now when were you first examined by Dr. Brown, do you remember?

A. I don't have the exact date, but Dr. Brown was with the examination car that travelled up and down the railroad and I went [79] to their examination car.

Q. Did Dr. Brown give you any slip showing that you were qualified for work?

A. That isn't customary with the medical department. He didn't give me any.

Q. Can you tell me what the date was that Dr. Slavin examined you and said that you were a border-line case on account of your blood pressure?

A. That was about November 20, 1935.

Q. That, however, was before you had applied to go back to work, was it not?

A. It is customary to take an examination before you return to work, yes, sir.

Q. I know, but at that time you were off on leave of absence, were you not? A. Yes, sir.

Q. And you had secured a leave of absence even after that, had you not? A. Yes, sir.

Q. So you weren't at that time applying to go

(Testimony of W. L. Olive.)

back to work, you were applying for a leave of absence, isn't that correct?

A. No, I applied to go to work. I submitted a bid on December 18, 1935.

Q. To go back to work? A. Yes, sir.

Q. But you also asked for a leave of absence on February 25, [80] 1936, did you not?

A. Yes, sir.

Q. You secured a leave of absence good until May, 1936, isn't that correct?

A. It is correct; to keep your leave of absence in order if you want to return to work.

Q. You stated on direct examination that you talked to several of the railroad company officials and they shoved you on to the medical department and then the medical department referred you back to the operating department. Now which one of the railroad officials besides Mr. Knickerbocker and Mr. Norton did you talk to in that regard?

A. My car foreman, Mr. Maydahl, and Mr. Morley and I believe the rest of it was all correspondence that is entered in that file. The file will bear out that statement.

Q. Now at the time of the last work for the company, your wages were 81½ cents per hour, were they not? A. That is right.

Q. That is your rate of pay? A. Yes.

Q. Eight hours per day? A. Yes.

Q. Fifty-six hours a week, that is correct?

A. Yes.

(Testimony of W. L. Olive.)

Q. Did you ever ask the railroad company to inform you why you were disqualified as a carman?

A. Yes, sir.

Q. And weren't you informed that it was on account of your physical condition?

A. No, they didn't answer that. That was all done by correspondence and it wasn't answered for two years and eight months why I was disqualified. I waited two years and eight months for that answer.

Q. Well, at the end of two years and eight months were you informed it was on account of your physical condition?

A. Yes, I was informed it was on account of my injured arm and I had already passed four examinations it was O. K.

Q. When were you informed it was on account of your injured arm?

A. It was a letter from Mr. Killian.

Q. Mr. Killian? A. Yes, sir.

Q. Was that from him to you? A. Yes, sir.

Q. Do you remember the date of that letter?

A. It is in that file, sir.

Q. In this file here? A. Yes, sir.

Q. Nobody had ever told you that you were being disqualified for any breach of rules or anything like that, had they? A. No, sir.

Mr. McNamee: I think that is all. [82]

(Testimony of W. L. Olive.)

Re-Direct Examination

By Mr. Taylor:

- Q. Mr. Olive, what is your occupation?
- A. I guess I am a railroad man.
- Q. Have you any other occupation?
- A. No, sir.
- Q. None that you can call your vocation?
- A. My vocation, no.
- Q. What have you been doing since you were discharged by the railroad company?
- A. Well, I have tried to transform my habits into a means of a livelihood. I have taught a little music, did a little odd jobs of painting, repair work of different kinds, most anything I could do to keep going.
- Q. But you have had no regular employment that could be regarded as a vocation since you were discharged from the railroad?
- A. With the exception of a year's work for the McNeil Construction Company.
- Q. What were you doing then?
- A. I was painting some of their axles out there.
- Q. Mr. Olive—I submit this is a defensive matter, but I think inasmuch as they have opened up the question of pay, I should show what he has received that might be regarded as an offset against his principal claim. Mr. Olive, what have been your wage earnings since the date of your discharge?
- A. Just a little better than \$900.00 a year.
- Q. Approximately \$75.00 a month? [83]
- A. Yes, sir.
- Mr. Taylor: I think that is all.

(Testimony of W. L. Olive.)

Re-Cross Examination

By Mr. McNamee:

Q. I want to ask you one or two questions along the last line there. As a carman, what were your duties, Mr. Olive?

A. You mean the position I occupied?

Q. Yes.

A. I think I had 9 inspectors to keep busy and then I had to work for myself, of course, inspecting trains in-bound and out-bound.

Q. Well, did it consist of repairing cars that were in the yard? Was that a part of your duties?

A. I had to see that they were repaired.

Q. Did you have to have knowledge of carpentry in order to do that?

A. Slight knowledge, yes, sir.

Q. Did you also have to have knowledge of painting in order to perform some of those duties?

A. In a meager way, yes, sir.

Q. And you had to have knowledge of other mechanical trades, did you not?

A. Not enough to sustain you in any good trade outside of the railroad.

Q. In order to be a carman, didn't you have to be a carpenter?

A. Not in the carpenter's sense of the word, no, sir. You had [84] to know enough to repair the railroad cars, but carpentering and car-building is a lot different.

Q. When was it that you went to work for McNeil?

(Testimony of W. L. Olive.)

A. When the plant started. I don't know the date.

Q. That would be 1942? A. Yes, sir.

Q. And you worked for how long?

A. A year.

Q. And then were you ill after that for a while?

A. Yes, I had some of that gas out there and it upset me quite a bit.

Q. How long were you ill?

A. About two months.

Q. Then before that time did you work for Mr. Underhill? A. Yes, sir.

Q. Where was that?

A. It was in his recreation hall, 125 Fremont.

Q. How long did you work for Mr. Underhill?

A. About a year.

Q. What wages did you receive from him?

A. \$35.00 a week.

Q. And prior to that for whom did you work?

A. I believe that is all the steady work.

Q. Did you have unsteady work from time to time? A. Just odd jobs, sir.

Q. What was the nature of the odd jobs? [85]

A. Whatever I could get to do—a little repair work here, roof repair or painting a garage or something like that.

Q. Painting or rough carpenter work?

A. Rough work, yes, no carpenter work.

Q. After your injury, what was the first work that you did? A. I taught music.

(Testimony of W. L. Olive.)

Q. I mean the first rough work you did, the first heavy work?

A. I didn't do any for two or three years after I—

Q. Well, after you were disqualified to work for the railroad, when was the first heavy work you did after that?

A. When I went to work for McNeil.

Q. Did you apply for any work to anyone during the interim? A. Yes.

Q. Who did you ask for work?

A. I tried to go to work as a carpenter out at Camp Seibert. I only lasted one day. That is when I found out I wasn't a carpenter.

Q. Did you apply for any other work as rough carpenter or carpenter helper? A. Oh, yes.

Q. Did you get work as that?

A. No, I couldn't qualify for that kind of work.

Q. Couldn't you qualify as a carpenter's helper?

A. I could possibly carry lumber, yes, sir.

Q. What other positions did you apply for?

A. I believe that covered everything, sir. [86]

Q. Was that all you were qualified to work at?

A. Yes, sir.

Mr. McNamee: That is all.

The Court: You worked for Mr. Underhill for \$35.00 a week approximately a year?

A. Yes, sir.

The Court: What was your income from McNeil?

A. It was \$1.12 an hour.

(Testimony of W. L. Olive.)

The Court: How many hours did you work for McNeil?

A. Forty-eight hours a week, I think.

The Court: Time and a half after eight straight hours?

A. Yes, sir.

The Court: Do I understand during this war period you have not been able to obtain employment?

A. Not of the type of employment I have been used to doing, no, sir.

The Court: You have part of the time then not been doing anything? A. Yes, sir.

Mr. Taylor: The McNeil employment was during the war period? A. Yes.

The Court: Any further questions of this witness?

Mr. Taylor: I think that is all.

The Court: Next witness. [87]

Mr. Taylor: We have a stipulation from counsel that I desire to offer as Plaintiff's exhibit—

Clerk: That will be 6.

Mr. Taylor: —relating to expectancy of life for a man 43 years of age.

The Court: You may read it then.

Mr. McNamee: I stipulated as to expectancy but I object to the admissibility on the ground it is irrelevant and immaterial.

The Court: I will hear from the gentleman on that.

Mr. Taylor: This is the theory, if your Honor

please, that this is a continuing contract. This is a contract for employment as long as a man may live or until he reaches the age of 60, under certain conditions, or 65, the age of retirement in this category of employment, and that having been discharged the measure of damages is those damages he suffered as a result of that discharge and that he should suffer as the result of being out of his employment throughout his—

The Court: Well, I think I will admit it. It is speculative at most as to the amount of wages this man is going to lose in the future, is purely speculative, because he might make more money than in his former job and it may be profitable to him, as far as that is concerned, and as far as expectancy is concerned, I think that is speculative.

Mr. McNamee: May it please the Court, I have one more objection [88] to the admission for the purpose of the record, and that is there is no contract introduced in evidence showing that plaintiff is engaged for the rest of his natural life.

Mr. Taylor: I think that is for the jury perhaps to determine, the effect of that contract.

The Court: Well, let us not argue. It will be admitted.

Mr. Taylor: Reading from Plaintiff's Exhibit 6:

“Stipulation.

“It Is Hereby Stipulated by and between the parties hereto and their respective counsel:

“That a human being forty-three years of age,

according to the American Table of Mortality, has an expectation of life of 26.00 years.

“Dated this 19th day of March, 1945.

“HAM & TAYLOR.

By RYLAND G. TAYLOR,

Attorneys for Plaintiff.

LEO A. McNAMEE, ESQ., and
FRANK McNAMEE, ESQ.,

Attorneys for Defendants.

By LEO A. McNAMEE.”

The Court: We might as well take our afternoon recess. Members of the jury, we will take a recess for 10 minutes at this time and counsel will stipulate the admonition heretofore given without repeating.

Counsel: We do, sir.

The Court: Bear in mind the admonition heretofore given. [89]

(Recess taken at 3:00 P. M.)

3:10 P. M.

Presence of the jury stipulated.

The Court: You may proceed. Call your next witness.

Mr. Taylor: Your Honor please, I think counsel concurs in this stipulation, that from January, 1944, on forward to this time that the wage scale for a carman in the job that Olive had when he last worked was \$1.09 per hour. Do you concur in that?

Mr. McNamee: The wage scale for a carman was \$1.04 and for a lead man was \$1.09.

Mr. Taylor: And we agree that Olive, I believe, was a lead man.

Mr. McNamee: Well, I don't concur in that. That is his testimony.

The Court: That stipulation covers the situation, then it is for the jury to determine which classification he came under.

Mr. Taylor: We rest, if the Court please.

Mr. McNamee: At this time, if your Honor please, I would like to introduce the deposition of Dr. Landenberger.

Mr. Taylor: I want to interpose objections to that deposition, if your Honor please. If your Honor please, we object to the exhibits to the deposition, that is, reports of Dr. Slavin and Dr. Brown, upon the ground and for the reason that it isn't the best evidence. It is hearsay; that is Dr. Slavin's report [90] to Dr. Landenberger, and they have incorporated in—

The Court: Counsel, I can't pass on these objections until I know what the evidence shows. You can read the deposition and then you can interpose your objections to the exhibits and we will ask for them at that time. I do not know what the deposition contains, what the exhibits may be.

Mr. McNamee: I will start reading and counsel can make his objections as we go along:

(Reads.)

(Deposition of Dr. J. C. Landenberger.)

“Deposition of Dr. J. C. Landenberger, a witness on behalf of Defendants, in the above-entitled Court, taken pursuant to the annexed Stipulation, at the residence of Dr. J. C. Landenberger at 58 Virginia Street, Salt Lake City, Utah, on the 8th day of March, 1945, beginning at 5 o'clock P. M., the witness being first duly sworn by me, the undersigned, a Notary Public in and for the State of Utah, who made answer under oath, to the respective interrogatories and cross-interrogatories attached to said Stipulation to him by me, as follows:

1st Interrogatory: What is your name?

A. John Carroll Landenberger.

2. What is your residence?

A. 58 Virginia Street, Salt Lake City, Utah. [91]

3. How old are you, Doctor?

A. 70, July 12th, this year.

4. What is your business or occupation?

A. Physician and surgeon.

5. How long were you engaged in the profession of physician and surgeon?

A. Forty-five years.

6. What medical school did you graduate from, and when did you graduate? What degrees have you received?

A. University of Pennsylvania, 1900. Doctor of Medicine.

7. When and where did you serve your internship?

A. St. Marks Hospital, Salt Lake City, Utah, 1900 to 1902.

(Deposition of Dr. J. C. Landenberger.)

8. In what states have you been licensed to practice medicine, and when were you licensed in each?

A. The State of Utah.

9. Do you belong to any medical or surgical societies and if so, please name them?

A. Salt Lake County Medical Society, Utah State Medical Association, American Medical Association, Pacific Association of Railway Surgeons, Fellow American College of Surgeons, Fellow American Association for the Surgery of Trauma.

10. During the years from 1935 to 1938, inclusive, [92] what official position, if any, did you hold with Union Pacific Railroad Company?

A. Chief Surgeon, also District Surgeon.

11. If your answer to the foregoing interrogatory be that you were Chief Surgeon, please state what your duties as such consisted of?

A. Management of the entire Hospital Department.

12. Over what territory did your jurisdiction as Chief Surgeon extend?

A. The Central and South Central Districts.

13. Did said Railroad Company also have employed, so-called "local Doctors" or "local Surgeons" in various localities along its lines?

A. Yes. These men were a part of our Hospital Department.

14. State whether or not it was a part of your duties to examine the physical condition of the employees of said Railroad Company, with a view of determining whether such employees were physically

(Deposition of Dr. J. C. Landenberger.)

able to perform their respective duties with safety to themselves and to others.

A. It was a part of my duty to approve the qualifications or rejection of all employees under my jurisdiction, after they had been examined by the local Doctors, and in some instances I made the examination myself. [93]

15. State whether or not it was a part of your duties as such Chief Surgeon to check the examinations, reports and recommendations of the local Railroad Doctors in connection with the physical condition of Railroad employees. A. Yes.

16. Are you acquainted with the Plaintiff in this case, Mr. W. L. Olive? A. Yes.

17. Did you ever have occasion to examine Mr. Olive physically, and if so, state on how many occasions, when, and the approximate date or dates of your said examinations.

A. Yes. I examined Mr. Olive in January, July and October of 1935, and probably on other occasions of which I have no definite recollection.

18. What was the purpose of said examinations?

A. The purpose of said examinations was to determine on behalf of the Railroad Company whether Mr. Olive was physically able, notwithstanding his recent injury, to perform his duties as Car Inspector or Car Repairer, with safety to himself and others.

19. Please state what said examinations consisted of and what tests, if any, were made.

A. General physical examination with patient [94] stripped, including observation of heart, lungs,

(Deposition of Dr. J. C. Landenberger.)

liver, abdomen, nervous system, extremities, bones and joints, etc., including urinalysis, blood pressure observation, etc.

20. What were your findings or determination as to his physical condition, from the examinations made by you, at the time of said respective examinations?

A. General condition was more or less normal. The blood pressure was up some, and there was limitation of motion at the left elbow. Flexion of the arm at the elbow was limited to 90 degrees, and extension was incomplete.

21. Did you ever have occasion to examine the reports of the physical condition of Mr. Olive, made by any of the local Railroad Doctors, who were under your jurisdiction? A. Yes.

22. If so, by whom were such reports made?

A. Dr. Slavin and Dr. Kenneth C. Brown.

23. What are the approximate dates of such reports?

A. Respectively, May 21, 1936; July 25, 1936, and August 4, 1936.

24. If you have any of said reports, will you please hand the same to the Notary who is taking [95] this deposition, so that he may identify them with appropriate Exhibit numbers, and so that they may be attached to and become a part of your deposition. A. Yes.

(The said reports are identified as Exhibits Nos. 1, 2, and 3, and the same are forwarded herewith.)

(Deposition of Dr. J. C. Landenberger.)

25. State whether or not you, as Chief Surgeon, rejected the Plaintiff, W. L. Olive, for re-employment by Union Pacific Railroad Company, as a Car Inspector? A. Yes.

26. If your answer to Interrogatory No. 25 is in the affirmative, did you make any report of such rejection to any of the officers and agents of said Railroad Company; if so, when, and to whom? * * *

Mr. Taylor: We have to state the answer before we can make the point of the objection.

"A. To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938."

Mr. Taylor: That is premised upon the examination of Dr. Landenberger, if at all, his examination of January, July, and October, 1935. His report is as of July 30, 1936, and May, 1938, which in itself is too remote. An examination of the dates indicated it could not be the basis of a finding, the examination of January, July, and October, 1935, could not be the basis of a [96] report made in July, 1936, and May of 1938. It is too remote because at that time the man and his physical condition was improving all the time.

The Court: Well, counsel, the defense in this case, in part at least, not entirely, is claiming that this man during certain periods was physically unable to perform his duties. Now is there any evidence that tends to prove or disprove that admissible? For instance, in this case—I don't know what the nature of his injury was—but they mention an elbow. Now as the improvement progresses, isn't

(Deposition of Dr. J. C. Landenberger.)

that admissible to show the nature of his injury and of this progressive condition for a certain time, and the jury are entitled to have that information.

Mr. Taylor: But the point—I may not be clear—he reports to Mr. Knickerbocker that the man is physically unfit—

Mr. McNamee: I have not got down to that. I think your objection, together with your reasons for the objection, is a little premature, until we get down to the meat of it.

Mr. Taylor: No, in July of 1936—

Mr. McNamee: You did not even let me read the answer. I had to read the answer in order to make the objection. The question was: "If your answer to Interrogatory No. 25 is in the affirmative, did you make any report of such rejection to any of the officers and agents of said Railroad Company; if so, [97] when and to whom?

A. To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938."

Mr. Taylor: Yes, that is just the point. Upon examination made in January, July, and October of 1935 he makes his findings in July, 1936, and May of '38 based upon a—

The Court: Well, I understand, counsel, by your opening statement for some period of 1937 he was physically able to resume his duties.

Mr. Taylor: Yes, that is true, sir.

The Court: And I assume that there is a dispute between you as to when he was able to resume his duties?

(Deposition of Dr. J. C. Landenberger.)

Mr. Taylor: That is right, sir.

The Court: And any evidence that tends to prove or disprove that evidence is admissible. Objection is overruled.

Mr. McNamee: Well, that answer to that question is: "To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938. (Continues with deposition):

"27. Did you give any reasons for your actions in this regard, and if so to whom were they given?

A. Yes. To Mr. F. H. Knickerbocker and Dr. Nilsson.

28. If your answer to Interrogatories 26 and 27 are in the affirmative, what were your reasons for so rejecting him?

A. On account of limitation of motion of left arm [98] at elbow I considered that Mr. Olive could not carry on his occupation as Car Inspector or Car Repairer with safety to himself and others.

/s/ J. C. LANDENBERGER."

Now at this time I offer in evidence as Defendant's Exhibits 1, 2, and 3, respectively, physical test records, two of which are signed by Dr. Hale B. Slavin, one dated May 25, 1936, one dated July 25, 1936, and one dated August 4, 1936, signed Kenneth C. Brown, two of which were signed by rubber stamp by Dr. Landenberger.

Mr. Taylor: To which we object, if your Honor please, on the grounds and for the reason they are

not the best evidence, they are hearsay, so far as Dr. Landenberger is concerned, and the further objection that they are not the best evidence. It is a written report.

The Court: Where are the doctors who signed the reports?

Mr. McNamee: Well, Dr. Slavin is in the South Seas, if your Honor please. I don't know where Dr. Brown is.

Mr. Taylor: Where is Dr. Brown?

Mr. McNamee: I don't know.

The Court: Counsel, it seems to me that the present objection is good because there is not sufficient foundation. I might state if you have evidence to show that these are part of the records of the railroad company, kept in the records in the ordinary course of business, that I might take [99] a different position in the matter, but there is nothing here—

Mr. McNamee: Well, Interrogatory 24 was: "If you have any of said reports, will you please hand the same to the Notary who is taking this deposition, so that he may identify them with appropriate Exhibit numbers, and so that they may be attached to and become a part of your deposition," and the answer is: "Yes," and it says: "The said reports are identified as Exhibits Nos. 1, 2 and 3, and the same are forwarded herewith." That appears from the deposition the reports were submitted—

The Court: I believe the objection at this time is good. It may be altered later, if you can introduce evidence to show that those are reports prepared by the railroad company in the ordinary

course of business and parts of their records, it will be admissible. It may be marked for identification at this time.

Clerk: A, B, C for identification. [100]

MR. F. H. KNICKERBOCKER,
a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Please state your name.

A. F. H. Knickerbocker.

Q. Where do you reside, Mr. Knickerbocker?

A. Salt Lake City.

Q. What is your profession, business, or occupation?

A. I am Executive Assistant to the President of the Union Pacific Railway.

Q. Between 1933 and 1937 what was your business or occupation?

A. I was General Manager of the L. A. & S. L. Railroad at Los Angeles.

Q. That is the Los Angeles & Salt Lake Railroad at Los Angeles? A. Yes.

Q. And how long were you such general manager?

A. About 13 years.

Q. From when to when?

A. From May 1, 1924, until April 15, 1937.

(Testimony of F. H. Knickerbocker.)

Q. Are you acquainted with Mr. W. L. Olive, the plaintiff in this case? A. I am.

Q. How long have you known him?

A. I knew Mr. Olive when he was working at Pocatello, Idaho. I was general superintendent there around '16 or '17.

Q. Did you ever talk to him at Las Vegas? [101]

A. On one occasion.

Q. Just a minute. Do you remember when Mr. Olive was injured while working for the railroad company? A. Yes, on February, 1934.

Q. And did you ever have any conversation with Mr. Olive subsequent to that injury?

A. Yes.

Q. When was it?

A. Well, I think it was in February, 1936.

Q. Is that the only conversation you had with him in Las Vegas that you know of?

A. That is the only one.

Q. Just state what the nature of that conversation was.

A. At that time Mr. Olive's physical condition was such that he was unable to pass the required examination of our company doctors. He spoke to me about the possibility of returning to work. I stated to him at that time that whenever the company doctors said that he was in safe condition to return to work that he would be permitted to resume service.

Q. Did you hear Mr. Olive's statement here on the stand, to the effect that you told him that he

(Testimony of F. H. Knickerbocker.)

was discharged and Maydahl had notified him that he was discharged? Did you hear him make that statement?

A. I heard him make that statement.

Q. Was there any such conversation between you and him? A. There was not. [102]

Q. Did you ever talk to him after his so-called discharge in October, 1936? A. No.

Q. This conversation that you had with him you said was in February, 1936?

A. That is my recollection, in February, 1936, and the only conversation I had with Mr. Olive about his case.

Q. Did he tell you at the time he was discharged?

A. I do not think the word "discharged" was used at any time in Mr. Olive's case. He was merely disqualified because of an injury that he sustained in February of 1934, which prevented him from passing the physical examination of the company doctors.

Q. Now in regard to carmen, Mr. Knickerbocker, what is the general nature of their duties as carmen?

A. Car inspectors are required to inspect both freight and passenger trains, to see that the running gear is in proper and safe condition to run, that the steam is through the passenger trains, that the proper servicings of water and ice and such things are completed, and when that work is done, to see that all airbrake equipment is in operative condition throughout the train. That is the last

(Testimony of F. H. Knickerbocker.)

thing that is done. Somewhat similar duties are required in the inspection of freight trains, except, of course, there is no steam or watering servicing to be done. When they are not inspecting trains that are passing through terminals, they have other work; they give car repair out on the rip track on any trains there, and such work consists at [103] times of repairing the superstructure of box cars, refrigerator cars, as well as the decks of flat cars, and so on.

Q. Must they have a knowledge of carpentering in order to be able to qualify as car repaire?

A. They must.

Q. Up until April, 1937, have you been advised by any of the company doctors that Mr. Olive had been passed physically?

A. I have no recollection of Mr. Olive's case subsequent about, I think, October or possibly November, 1936, and at that time I was advised that he was then in condition to resume service but had declined to do so, pending an adjustment in his time claim.

Q. In order to be qualified as a carman, I will ask you to state whether or not it is necessary for a man to have the use of his extremities, like his arms and his legs?

A. They are very essential to the proper handling of the job. They are required at times to crawl under cars, climb up cars, either on the ladder on the ends of the box cars, refrigerator cars, or down a ladder that may be placed beside them, and any

(Testimony of F. H. Knickerbocker.)
impairment of any defect in a man's arms or legs would certainly make him a risk and a hazard, not only to himself, but possibly to fellow employees.

Q. Now I will show you a book which is entitled, "Union Pacific System," with the names of several of the companies belonging to that system, "Rules Governing the Determination of Physical Qualifications of Employees. Operating Department. Effective [104] January 1, 1927," and ask you if you are acquainted with that book?

A. I am.

Q. Can you state when that was promulgated or put out?

A. It became effective on January 1, 1927.

Q. And what does it purport to contain?

A. It contains the rules that are embodied in here pertaining to the physical condition of employees. I notice that my name as general manager for the Los Angeles & Salt Lake Railroad Company is signed to the rules, along with other operating officers.

Q. In regard to Rule 4 that is appended thereto, was that in effect at the same time, or do you know when that was changed?

A. I think it was changed subsequently to the effective date of January 1, 1927, but just what date Rule 4 was changed or modified, I am not clear now, without looking at the record.

Q. I show you this, and I am going to offer it in evidence. I will ask you to state whether or not this book of rules, pertaining to the medical condi-

(Testimony of F. H. Knickerbocker.)
tion of employees, is one of the conditions of the employment of each of the employees of the operating department at that time? A. It is.

Mr. McNamee: May this be marked as defendants' exhibit.

The Court: I understand there is no objection?

Mr. Taylor: No objection. [105]

Clerk: Defendants' Exhibit "D".

Mr. Taylor: What was the effective date of that amendment?

Mr. McNamee: He didn't know the effective date of it.

The Court: He testified he didn't know.

Q. I will show you defendants' Exhibits A, B, and C for identification and ask you to state whether or not you know what those instruments are?

A. These are physical test records issued in all cases by the examining surgeon of the railroad.

Mr. Taylor: I object.

The Court: He is not testifying as to the contents.

Mr. Taylor: I am fearful the harm will be done by this method.

The Court: I will clarify the atmosphere. Mr. Witness, are these records kept in the regular ordinary course of business of your company?

A. Yes sir.

Q. And are part of the files of your company?

A. They are.

Q. Kept in due course and regular course of business? A. Yes sir.

(Testimony of F. H. Knickerbocker.)

Q. And are furnished to you by various surgeons or physicians that made the examinations?

A. Yes sir.

The Court: They will be admitted in evidence, gentlemen. [106] If you will look in the Judicial Code, I think 572 or 578, you will find records kept in regular and ordinary course of business are admissible.

(Exhibits A, B, and C admitted in evidence.)

DEFENDANT'S EXHIBIT "C"

As set forth in "Designation of Record" Filed March 19, 1945.

Union Pacific Railroad Company

Physical Test Record

(To be made by medical examiner)

Biennial Re-Examination

Of Olive, Willard Lynn, age 33, Residence Las Vegas, candidate for Return to Service as Car Inspector on U. P. R. R. Railroad, S. W. Dist., Division 18.

Height 6', Weight 189, color of eyes blue, color of hair brown.

What diseases or illness have you ever had? Usual childhood & pneumonia, Appendectomy 1927.

Have you been disabled from sickness in past 5 years? No.

(Testimony of F. H. Knickerbocker.)

Nature of sickness: Duration.

What injuries have you ever had? Fracture of left humerus 1933.

Do you have cough? No.

Shortness of breath? No.

Palpitation? No.

Dizziness? No.

Headache? No.

Weakness? No.

Difficult or frequent urination? No.

.....

(Signature of employee)

4th Test—General Physical Examination
Nervous.

Urine: Spec. Grav. Albumin Neg. Sugar Neg.
Microscopical, if ordered.

Rate of Pulse 112 B.P.S. 146.
When? NT 98

Has he had Smallpox? No, or been vaccinated?
Yes when NT.

Has applicant ever been or is he now the subject of disease of lungs? No. Heart? No. Stomach? No. Bowels, including rectum? No. Kidneys? No. Genito-urinary organs? No. Nervous system? No. Skin. No.

(Testimony of F. H. Knickerbocker.)

Has applicant any deformity or disability due to injury or disease? If so describe

Has he hernia? No. What form? Present condition of same?

Has he hydrocele? No. Size? Varicocele? No. Size?

Distinguishing marks or characteristics.

Order for examination issued by: Title.

Is candidate Qualified or Disqualified? (When in doubt, refer to Chief Surgeon).

Dated at Las Vegas, August 4th, 1936.

/s/ KENNETH C. BROWN M. D.

Signature of Surgeon.

Remarks: Tonsils, Neg. Teeth, fairly good. Thyroid, Neg. Rhomberg, Neg. Reflexes, Neg.

Endorsement of Chief Surgeon, Rejected.

Forward in duplicate to Chief Surgeon. (Stamp not decipherable).

[Endorsed]: Filed March 2, 1945. [37]

Mr. McNamee: Cross-examine.

Mr. Taylor: No cross-examination.

Mr. McNamee: That is all.

Mr. Taylor: I do want to cross-examine, if your Honor please. I will ask your Honor's leave—well, your Honor made the ruling—I still question

(Testimony of F. H. Knickerbocker.)

those documents, but I don't want to be in the position of defense here.

The Court: You are doing a pretty good job. You might as well proceed.

Mr. Taylor: Well, I have no further questions.

MR. JOHN W. BURNETT,

a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Please state your name?

A. John W. Burnett.

A. Chicago, at the present time.

Q. What is your profession, business or occupation?

A. I am selling for the Runyan Metals Company.

Q. Were you ever employed by the Union Pacific Railroad Company? A. Yes sir.

Q. And the Los Angeles and Salt Lake Railroad Company, or just the Union Pacific?

A. Well, the Union Pacific employment called for jurisdiction over the Los Angeles and Salt Lake mechanical department.

Q. When did you leave the employ of the Union Pacific? A. June 1, 1940.

Q. What was your position with the Union Pa-

(Testimony of John W. Burnett.)

cific when you were employed by them, up to the time that you left the service?

A. General superintendent of motive power.

Q. And how long had you held that office?

A. Since 1933, August, 1933.

Q. Are you acquainted with Mr. W. L. Olive, the plaintiff in this case? A. No sir. [108]

Q. Did you ever meet him?

A. I do not know as I ever met him. I may have seen him around the works.

Q. You never had any discussions with him yourself? A. No sir.

Q. Did you ever have any discussions with Mr. T. J. Eney as his representative? A. Yes sir.

Q. And were those discussions relative to Mr. Olive being returned to the service of the Union Pacific Railroad? A. Yes sir.

Q. Do you remember when you had your first conversation or discussion with Mr. Eney?

A. It was the practice to hold meetings once each month with all the general chairmen of the different crafts and in two or three of those meetings—I don't recall the dates except the last one in Salt Lake—Mr. Olive's case was discussed before all the general chairmen representing all the crafts of the railroad.

Q. Did you know at that time that Mr. Olive had previously been injured while in the employ of the railroad company? A. Yes sir.

Q. And you knew that he had been out of service on account of his injury for some time?

(Testimony of John W. Burnett.)

A. Yes sir.

Q. What was the nature of the discussion? What did you and [109] Mr. Eney discuss at this conference?

A. Well, Mr. Eney, representing Mr. Olive, asked to have Mr. Olive go back to work and during the discussion it developed from the files that Mr. Olive had never been approved by the medical department as in fit condition to go to work and I believe that at the last meeting in Salt Lake City, which was probably in May of 1936, Mr. Eney called Mr. Olive by telephone.

Q. Was that May of 1936 or later?

A. It may have been later. That date is not clear in my mind, but anyway, he called Mr. Olive by telephone during the meeting and advised Mr. Olive—

Mr. Taylor: We object as hearsay.

The Court: You didn't hear?

A. I heard his end of the conversation and I was sitting in the room with him and he said—if Mr. Olive was on the other end of the phone and I assume he was—that is an assumption—that he would have to be examined and get an approval or OK from the chief surgeon before he could go to work, and that was my request to Mr. Eney at the time.

Q. Subsequent to that, did you have any conversation with Mr. Eney?

A. I had different conversations with Mr. Eney at different times.

(Testimony of John W. Burnett.)

Q. In regard to this Olive case?

A. In regard to the Olive case, yes sir.

Q. Did you ever have any correspondence with Mr. Eney concerning [110] this case?

A. Yes sir.

Q. I will show you what purports to be a letter from Mr. Eney and ask you whether or not you are acquainted with that signature? A. I am sir.

Q. And is that the signature of Thomas J. Eney?

A. Yes sir.

Q. And did you receive this letter in due course of mail? A. I did.

Mr. McNamee: I wish to offer this letter in evidence.

The Court: Can't we move along a little faster?

Mr. McNamee: I offered this letter in evidence and I was waiting for counsel.

Mr. Taylor: I had not seen the letter. To which we object, if your Honor please, because there is no evidence that the letter came to the attention of Mr. Olive.

The Court: If he is his representative, it wouldn't make any difference, would it?

Mr. Taylor: I think it would, if your Honor please.

The Court: You have been relying upon statements of the representatives of the railroad company.

Mr. Taylor: The Union is authorized to represent the Union in terms they make with the railroad in regard to the contract and working condi-

(Testimony of John W. Burnett.)

tions and such as that, but the Union wouldn't have any—the Union couldn't go as far as to [111] sell a man down the river. He couldn't waive his inherent rights to enforce the contract without his knowledge of what was going on.

The Court: I know, but Mr. Olive testified that this man Eney, he consulted with him and asked him to represent him, to take up with the railroad company his reinstatement. It was his own testimony that established him as his representative, as his agent, whether he was connected with the Brotherhood or not. Isn't that Mr. Olive's testimony?

Mr. Taylor: Yes, it is true he testified—

The Court: It will be admitted. In admitting evidence, gentlemen, I believe in putting the whole picture before the jury.

Clerk: Defendants' E.

Q. (Mr. McNamee) I show you what purports to be another letter signed by Mr. Eney, dated October 21st, but apparently a typographical error, should be October 31st instead of 21st, signed Thomas J. Eney, and ask you to state whether or not that is the signature of Thomas J. Eney?

A. It is.

Q. And did you receive this letter in the due course of mail? A. I did.

The Court: Gentlemen, read that letter. That is the only way the jury will know what we are talking [112] about.

Mr. Ham: If the Court please, we object to the

(Testimony of John W. Burnett.)

introduction of the letter. Counsel is presuming to change the date and there are pencil marks on it designating the change.

Mr. McNamee: Well, I will cross it out.

The Court: That is true. Read the other letter, counsel, which is in evidence so we will keep moving here.

Mr. McNamee: I will read to you letter dated July 26, 1938, which is Defendants' Exhibit E:

“J. W. Burnett
Gen. Supt. MP&M
Omaha, Nebraska

Dear Sir:

“In reply to your letter of July 12, with reference to the case of W. L. Olive, Carman at Las Vegas, Nevada.

“Wish to state that the Executive Board of the B.R.C. of A. on the Union Pacific System in Ogden, Utah, on June 5, 1938, requested me to negotiate return to service W. L. Olive pending settlement of his claim for compensation from May 1935 up until the time he was returned to service.

“As per your previous letter which you stated that you would have Olive re-examined and if physically fit he would resume his service as Car Inspector at Las Vegas. Wish to inform you that Mr. Olive refuses to accept this settlement; therefore in accordance with the wishes of the Executive Board, I placed the complete file in the hands of

(Testimony of John W. Burnett.)
the General President of the B.R.C. of A., Felix H. Knight, Kansas City, for final disposition. I will advise you that you may receive copy of the reply when I hear from him concerning this case.

“Very truly yours,

“THOS. J. ENEY

“General Chairman J.P.B.”

Mr. McNamee: We offer this.

Mr. Taylor: What is the date of that last letter?

Mr. McNamee: It is October 21st.

Mr. Taylor: What year?

Mr. McNamee: 1938. This is letter dated October 21, 1938: (Reads)

“Mr. J. W. Burnett,
Gen. Supt. MP&M,
Omaha, Nebraska.

Dear Sir:

“This is in reply to your letter of October 22, File No. 011-122-2, received at this office October 27, in which you refer to conference in connection with the case of W. L. Olive, Carman at Las Vegas, Nevada.

“You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive’s failure to return to service since October 1937.

“If, as Mr. Olive requests, you will return him

(Testimony of John W. Burnett.)

to service with compensation from May 1935 up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.

"As stated before in conference, I have turned the file over to the General President, F. H. Knight, upon request of the Executive Board of the Joint Protective Board of the Carmen.

"Very truly yours,

(Signed) THOS. J. ENEY

General Chairman J.P.B."

Q. Prior to that time, Mr. Burnett, you did make an offer to Mr. Eney to return Mr. Olive to work providing he would waive his back time, did you not?

A. Prior to that time I told Mr. Eney that he could go to work [114] if and when he was approved by the medical department and Mr. Eney advised me that he wanted back pay and in those cases we can't settle any back pay arguments at the time we authorize a man to go to work. That is for later consideration and we couldn't even talk to Mr. Eney about back pay to Mr. Olive until he went back to work and appealed his back pay with the organization set up to handle such matters.

Q. Have you ever sat in on any of those conferences in regard to back pay or disputes between the employee and the railroad company?

(Testimony of John W. Burnett.)

A. I have—

Mr. Taylor: We object.

The Court: Just a minute. Read the question.

(Question read.)

The Court: Objection will be sustained. We are trying this case, gentlemen.

Mr. McNamee: Cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Did you know your company said to Mr. Eney that Mr. Olive would be reinstated to his employment on the basis of no compensation for time lost? Did you ever tell him that?

A. Repeat that. You stated—

The Court: Read the question.

(Question read.)

A. I don't recall that I did, but it is entirely possible, because [115] occasionally we offered a man that was seeking reinstatement that particular consideration.

The Court: Did you ever offer Mr. Olive an opportunity to go back to work and handle the question of compensation due through other channels?

A. Yes sir.

The Court: When?

A. To Mr. Eney in Salt Lake City, that meeting we held in May 19—I will have to depend upon the record of the meeting for that date. I do not remember exactly.

(Testimony of John W. Burnett.)

Q. (Mr. Taylor) Was that about May 30th of 1938?

A. That is probably true, right in there some place.

Q. (Mr. McNamee) Is that in regard to the conference?

A. Conference, yes, in Salt Lake City.

The Court: Did you ever get any reply to that offer?

A. Yes, I got a reply from Mr. Eney to that offer.

The Court: What was his reply?

A. The reply was he had submitted that offer to Mr. Olive and Mr. Olive refused to go to work without compensation for time lost before he went to work.

Mr. Taylor: That is all.

Mr. McNamee: That is all, Mr. Burnett. [116]

MR. THOMAS E. ENEY,

a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Will you please state your name?

A. Thomas J. Eney.

Q. Where do you reside, Mr. Eney?

A. I reside at Edmonds, Washington.

(Testimony of Thomas E. Eney.)

Q. What is your business or occupation?

A. At the present time I am retired on disability.

Q. During the years 1934 to 1938, inclusive, what was your business or occupation?

A. General Chairman of the Brotherhood of Railway Carmen of America, Joint Protective Board, for the Union Pacific System.

Q. And where did you have jurisdiction, over the Union Pacific System?

The Court: He stated Union Pacific.

Mr. McNamee: I couldn't hear. I see.

Q. Are you acquainted with Mr. Olive?

A. I am.

Q. How long have you known Mr. Olive?

A. Well, I presume—well, I would say since 1935.

Q. On how many occasions have you met Mr. Olive, do you remember?

A. Well, I would say on or about two occasions.

Q. When was the first occasion that you met him, do you remember? [117]

A. Well, if I can recollect right, I think it was 1935. I am not sure, though, it has been so long, I couldn't say, but I was out here on a visit with him and I think there was one of the committee along and we went down to see the doctor.

Q. Was that after his injury on the railroad?

A. That was after his injury.

Q. And did he ask you at that time to see about his being returned to work?

A. He was mostly concerned in being returned to service.

(Testimony of Thomas E. Eney.)

Q. Do you know whether or not he had taken the matter up with the Local Protective Board at that time?

A. I would not be in a position to say unless I had my file. I do not think so.

Q. You do not have your file with you?

A. No, sir.

Q. Where is your file, Mr. Eney?

A. My successor has the file in Omaha, Nebraska.

Q. At any time did you represent Mr. Eney in his application to the railroad company for reinstatement? A. You said Mr. Eney.

Q. I mean Mr. Olive.

A. May I have that question?

Q. I say did you represent Mr. Olive in his application for reinstatement with the railroad company?

A. I did.

Q. With whom did you discuss his case? [118]

A. You mean with the railroad company?

Q. Yes.

A. I discussed it with Mr. J. W. Burnett.

Q. Do you remember on how many different occasions?

A. Well, I would say on three occasions.

Q. Do you remember on one occasion discussing with Mr. Burnett in which—

Mr. Ham: Objected to as a leading question.

Mr. McNamee: I withdrew that.

Q. Will you just state the nature of those discussions with Mr. Burnett, the time and place and who was present?

(Testimony of Thomas E. Eney.)

A. Well, the procedure of the general chairman is to negotiate a conference and there are seven general chairmen that represent the organization that I was connected with. Either the manager or the general chairman, the secretary of the Federation, would write them a letter when they were going to have a conference and they would reply and those conferences were where this took place.

Q. Do you remember what was discussed in any of those conferences?

The Court: Tell us what he said to Mr. Burnett and Mr. Burnett replied in those negotiations—to make a long story short.

Q. Yes.

A. We go into conference and each respective chairman has what we call grievance files. The company is advised in advance what [119] this case is. They have a personnel man and he makes a list of these grievances, then when we get into conference, we sit across the table and we discuss each man's question. At these conferences the request for return to service, that is for Olive, was made at that conference.

Q. And do you know what the result of the conference was?

A. Well, the result of the last conference I had in his case, if I recollect right, was that we called up on the telephone and got Mr. Olive on the phone and it was agreed between Mr. Burnett and I that he would go to Los Angeles for examination and that I requested Mr. Burnett the only way he could go

(Testimony of Thomas E. Eney.)

there I wanted one of our committee men present at the examination. That was finally agreed to. He went down and was examined and I was informed by the representative, Mr. Crier, that he passed everything OK and he was to return to Las Vegas and accept employment.

Q. And accepted employment, you say?

A. I say he was to return to accept his employment at Las Vegas. That was my understanding with the management.

The Court: Do you know why he didn't?

A. Well, I would say—he was concerned about the adjustment of the time that was involved, the compensation involved of him being out of employment at the time.

The Court: Well, was there anything said between you and Mr. Burnett to the effect that he was not to receive the compensation for time off? [120]

A. Well, I made demands on the company, my letter states there, from 1935. However, they wouldn't accept that but they did agree that he could return to service and we could subsequently go in and determine how much the value of the time lost would be.

The Court: Did Mr. Olive refuse to proceed with that?

A. He evidently did. He isn't working.

The Court: I know, but you communicated that fact?

A. Yes, sir.

Mr. McNamee: Cross-examine.

(Testimony of Thomas E. Eney.)

Cross-Examination

By Mr. Taylor:

Q. What was the date of his trip to Los Angeles, Mr. Eney?

A. I couldn't really give you the date.

Q. Approximately when was it?

A. We have a record there.

Q. Will you refresh your memory when and tell us the approximate date when you insisted upon your committee man going down?

A. I think it was subsequent to June, either 4th or 6th, of 1938.

Q. You say it was the 4th or 6th of June, 1938?

A. I am not sure.

Q. You have means of refreshing your recollection, haven't you?

A. I have no files here because I am not in position to have the files any more. I am not in position of general chairman.

Q. When is the last time you communicated with Mr. Olive? A. It was after that conference.

Q. Have you any means of getting the information upon which to [121] refresh your memory?

A. Not now. You see I am requested—when I resigned my position, I had to turn my files over to the other man succeeding me. That is the law of the Committee.

Q. How can you get the information to definitely refresh your memory?

A. I would have to go in there and get those files.

(Testimony of Thomas E. Eney.)

Q. In where?

A. Omaha, Nebraska.

Q. To be exact, directing your attention to a time in October, 22nd, 1937, couldn't that have been the time that he was ordered down to surgeon Fagen's office in Los Angeles, don't you think probably about that time? Mr. Olive has testified he was at Dr. Fagen's office about that time.

A. Did he testify Mr. Crier was with him?

Mr. Taylor: I don't recall.

Q. And again he was there may 27, 1938. Could it have been that time?

A. Well, if it was the time that Mr. Crier was there, that was the time. I think he admitted this morning that Mr. Crier was with him on one occasion.

Q. If Mr. Olive would say Mr. Crier was with him, then that would be the time, is that true?

A. Wel, I presume it would be true? I would take his word for it.

Q. Well, that would be your best opinion? [122]

The Court: We are going to use this man's memory on somebody else. What he remembers, if he can remember, to fix a date, that is all right, but he is basing his testimony on his memory, not what somebody else tells him.

Mr. Taylor: I am in a bad situation, your Honor, he apparently doesn't recollect.

The Court: I realize the man's memory, by his own statement, is not very good. His answer is if

(Testimony of Thomas E. Eney.)

Mr. Olive said that he was, "I will take his word for it." Well, that is not evidence.

Q. Then did you shortly after that communicate with Mr. Olive?

A. I ordered my secretary to communicate. Usually the local chairman—you don't deal directly with the person that makes the complaint; you deal with the committee.

Q. Did you after that communicate with Mr. Olive? A. I am almost sure that I did.

Q. Do you remember the means of communication you used?

A. I used to write on an average of 60 letters a day and I couldn't really tell you whether it was a letter or telegram.

Q. It might have been either. Do you remember how soon after that trip you communicated with him?

A. Well, I communicated with him just as soon as Mr. Crier informed me.

Q. Can you remember the time?

A. I would say a couple of days. [123]

Q. Do you remember where you were at the time you communicated with him?

A. I think I was in Salt Lake City.

Q. It could have been at Omaha, couldn't it?

A. Possibly.

Q. Now I will call your attention to what is marked Plaintiff's Exhibit 7 for identification and ask you if that is copy of the wire that you sent?

A. I do not deny the existence of that wire.

(Testimony of Thomas E. Eney.)

Q. You say that perhaps you send that wire. That is your name, there, isn't it?

A. I would think so.

Mr. Taylor: I now offer this into evidence as Plaintiff's Exhibit 7.

Mr. McNamee: I didn't hear what the witness said.

Mr. Taylor: He said he thought that was the wire. He acknowledged it.

Mr. McNamee: We have no objection.

The Court: It may be admitted.

Clerk: Plaintiff's 7.

Mr. Taylor: (Reads.)

“1938 May 30 AM 11 56

“S25 25—Omaha Nebra 30 12 1 P

“Williard L Olive

“Understand You Have Passed Examination. Ready to Restore You to Work Immediately on the Basis of No Compensation for Time Lost. Advise If You Concur.

“THOMAS J. ENEY.” [124]

Mr. Taylor: That is all.

The Court: Will you explain that testimony with your telegram?

A. It begins to come to my memory now from the receipt of that telegram, that we held a conference on the subject of returning him to service and it was agreed with the management that we would

(Testimony of Thomas E. Eney.)

put him back, pending the suit of his. I tell you the reason why, too. The organization, the committee board appealed over that statement and it was referred to them in the session and continuation in Ogden, Utah, and I was instructed to take the case up with the management further and get him back to employment and subsequently later take up the question of compensation.

The Court: And did you do that?

A. Yes, I wrote a letter to Mr. Burnett to that effect. I believe he read the letter.

The Court: Did the company then offer to do that?

A. They were agreeable for him to go back to work and discuss it later.

The Court: In your discussions concerning Mr. Olive's case, did you find any feeling or animosity that indicated the railroad company was trying to keep him out of service?

A. In my opinion as a general chairman, I did not find any antipathy against Mr. Olive. They were desirous of having him back on the job. The only question was the settlement of his claim. [125]

Re-Direct Examination

By Mr. McNamee:

Q. I will show you Defendant's Exhibit F, which purports to be a letter written by you under date of October 21, 1938, and ask you to state whether or not you wrote that letter? A. I did.

(Testimony of Thomas E. Eney.)

Q. Is that the letter—does that refresh your recollection in regard to this?

A. Well, this is one that has been read here, isn't it?

Q. Yes.

A. It is October 21, 1938. I recognize the letter. I will admit the letter.

Q. Does that refresh your recollection as to whether or not there was any other transactions between you and Mr. Burnett in regard to Mr. Olive being permitted to return to work with the question of his pay to be discussed afterwards?

A. Well, it states in there about 1937: "You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive's failure to return to service since October, 1937."

Q. Well, Mr. Burnett says he won't assume any responsibility, but nevertheless was there any discussion between you and Mr. Burnett—

Mr. Ham: We object to that, if the Court please, as leading. This is his witness. It is certainly leading and suggestive.

The Court: It is leading. I think you had better let [126] the witness do the testifying instead of testifying for him.

Q. I will show you Defendant's Exhibit E and ask you to read it and ask you to state whether or not that refreshes your recollection as to the conversation or conference you had with Mr. Burnett?

A. That is correct.

(Testimony of Thomas E. Eney.)

Q. Now can you state just what the nature of those conferences were that you had with Mr. Burnett?

A. The conference was relative to returning Mr. Olive to service, putting him back on the job.

Re-Cross Examination

By Mr. Taylor:

Q. Mr. Eney, in your letter to Mr. Burnett of October 21, 1938, you state the following:

“If, as Mr. Olive requests you will return him to service with compensation from May, 1935, up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.”

You meant by that, didn’t you, to call Mr. Burnett’s attention to the fact that he had refused to adjust his compensation, is that right?

A. I wouldn’t say necessarily, no.

Q. Then what did you mean by this: “—he has been so notified and it is within his jurisdiction to determine his own responsibility.” [127] You meant to say, didn’t you, that Mr. Olive could go to work and waive any compensation due him, or stand on his rights to collect his pay, wasn’t that—

A. No, he didn’t have to go to work and waive anything. He could have gone to work and then requested compensation after he returned to service.

(Testimony of Thomas E. Eney.)

Q. That is your conclusion, isn't it, but that isn't what you told him in this telegram?

A. I told him that they had refused at that time—

Q. You told him he could go to work if he waived any pay he had coming, didn't you; and this was the sense of the position that the railroad company made at that time, wasn't it, is that right?

A. I didn't get that question. I am not an attorney.

The Court: I think the question is argumentative, too, counsel. The documents speak for themselves.

Mr. Taylor: That is all.

Mr. McNamee: That is all.

The Court: How many more witnesses?

Mr. McNamee: If your Honor please, I don't know if we will have any more witnesses right now.

The Court: At this time we will take a recess until 10:00 o'clock tomorrow morning. The jury will bear in mind the admonition of the Court heretofore given and return at 10:00 o'clock tomorrow morning.

(Recess taken at 4:35 P. M.) [128]

Tuesday, March 20, 1945

10:00 A. M.

Attorneys present as at previous session. Presence of the jury stipulated.

The Court: You may proceed.

Mr. Taylor: I would like leave to recall Mr. Eney on cross-examination, if I might.

Mr. Eney, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Taylor:

Q. Mr. Eney, you know Mr. Felix Knight?

A. Yes, sir.

Q. Who was he?

A. He is the general president of the Brotherhood of Railway Carmen of America.

Q. Now at some time or other you turned this record and file over to Mr. Knight, didn't you?

A. Yes, sir.

Q. Do you recall when that was done?

A. Well, I would say that was after June, 1938. Some time after that. I don't remember—probably in October.

Q. To refresh your memory, wasn't it about the first of July, 1938?

A. It is possible it was around that time. I couldn't say for sure because I have not now the correspondence.

(Testimony of Thomas E. Eney.)

Q. That is the best of your recollection? [129]

A. Well, it was subsequent to the convention that was held in Ogden, Utah.

Q. And what was the date of the convention?

A. June 8th, I think was the correct date.

Q. This is not your letter, but I show you what purports to be a copy of a letter from Mr. Knight to Mr. Thurmond and ask you if that probably indicates the true fact?

A. Well, this is a copy of the letter. I guess Mr. Thurmond has the original letter. I suppose Mr. Thurmond has the original letter. You can get it from him.

Q. You are familiar with Mr. Felix Knight's signature, aren't you?

A. I have been familiar with it.

Mr. Taylor: This is a little unusual, but Mr. Thurmond is in the court room under subpoena and the question about this letter at this time, I have not consulted Mr. Thurmond—I will inquire, with the Court's permission, if he has the original of this letter, if there is no objection.

(Counsel consults with Mr. Thurmond.)

Q. I will call your attention to this letter and ask you if that is Mr. Knight's signature?

A. That is his signature. May I read this letter?

Mr. Taylor: Yes, surely.

Mr. McNamee: We object on the grounds it is incompetent, irrelevant, and immaterial, and also hearsay.

The Court: The letter is from whom? [130]

(Testimony of Thomas E. Eney.)

Mr. Taylor: It is from Mr. Knight, the officer—

The Court: To whom?

Mr. Taylor: To Mr. Thurmond. Mr. Knight was an officer of the—

The Court: Why wouldn't it be admissible, counsel?

Mr. Taylor: Maybe if I explain to your Honor—

The Court: I don't want the substance of the letter brought out before the jury, but a letter between third parties is not—

Mr. Taylor: May I explain the purpose of the offer, if your Honor please?

The Court: It isn't the question of purpose, but here is a letter this witness didn't write and he certainly isn't in a position to recognize that letter either one way or the other. The contents of the letter may be admissible through the other witness, but not through this witness. You might ask him questions as to the knowledge of certain things that that letter contains, without reading it. I make that as a suggestion. I want to help both sides.

Q. Refreshing your memory—you have read this letter I handed to you?

A. Yes.

Q. Refreshing your memory from that, does this aid your memory at all, does this assist you in refreshing your memory as to [131] when you turned the file over to Mr. Knight?

A. What date? I can't tell because I handled a vast amount of correspondence there. I see it ac-

(Testimony of Thomas E. Eney.)

knowledges receipt of his communication relative to the file. He doesn't state there what date he received it, does he?

Q. No, but it is entitled—yes, he indicates 5th.

A. If that explains what date he received it; that explains when he received.

Q. Yes, then using this as a basis——

The Court: May I see the letter?

(Court reads letter to himself.)

The Court: It seems to me that this letter is innocuous except for establishment of the date. I do not see any serious objection to it. Does that help you to fix in your mind—would you say that was about the date?

A. Well, he says he received here on the 5th, a communication from Mr. Thurmond, but it doesn't state that that file went in. The communication was directed by Mr. Thurmond to Mr. Knight.

The Court: That was when you stepped out of office?

A. No.

The Court: You were still in?

A. General chairman, but Mr. Knight is the head of the whole organization.

The Court: In other words, that file was forwarded to him?

A. That is right, but it does not state in here——

The Court: Well, it was about that time, would you say?

A. Well, I couldn't say. I presume it would be about that time. Mr. Thurmond would be better able

(Testimony of Thomas E. Eney.)

to tell you. This is dated July 9th and acknowledges the receipt of his letter of the 5th, so prior to the 5th he had received the file.

Q. After that file was turned over, your activities on behalf of Mr. Olive ceased, didn't they, at that time? You had nothing more to do with, you turned it over to Mr. Knight? A. Yes.

Q. That was July of 1938, wasn't it?

A. I think—well, whatever the date states there.

The Court: It states it was July, 1938, the fore part of July.

Q. Mr. Eney, do you recall an incident about April 30, 1938, when you were at Los Angeles and you received a wire from Mr. Olive regarding his case? To refresh your memory, I will call your attention to what purports to be a copy—

The Court: Counsel, the letters that you offer I suggest that you mark for identification.

Mr. Taylor: Very well, sir.

A. This is just a copy of the telegram.

Q. My question is, did you receive a wire, of which this is a copy, or a wire of similar import to this copy, to the best of your recollection?

A. I couldn't say that I did.

Q. You don't remember? [133]

A. I don't remember that because I received many telegrams.

Q. You wouldn't say that you didn't receive such a wire?

A. It is possible I received a telegram that date, but I couldn't say as to that particular one, because

(Testimony of Thomas E. Eney.)

I might have been in conference at Omaha and they might have delivered the message.

Clerk: Plaintiff's Exhibit 8 for identification.

Mr. Taylor: I desire to reframe this question.

Q. Mr. Eney, will you state whether or not, on or about the 30th day of April, 1938, you received a wire—now, I do not want to read the wire—I believe I can do it this way—

The Court: Mr. Olive is in position to testify to anything he sent, so you might as well read it when he takes the witness stand.

Mr. Taylor: Very well.

Q. State whether or not, on or about April 30, 1938, you received a wire from Mr. Olive, reading as follows: "You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge and their decision in black and white. You have not personally advised me of your decision and I want that in writing from you personally before I sign anything. Is it not possible to handle my case like other local cases are being handled, and that is to let me return to work and the subject of time lost discussed at the leisure of others concerned. Answer return wire. W. L. Olive, 515 Carson Street." Did you receive such a wire as that from Mr. Olive? [134]

A. I couldn't say I did.

The Court: As I understand your testimony, you may have received it?

A. May have and may not, your Honor. I re-

(Testimony of Thomas E. Eney.)

ceived many messages in my travels. I get into a town and I probably receive five or six.

Q. I will call your attention to this letter and ask you if that is your signature?

A. That is my signature.

Mr. Taylor: I offer the letter of June 30, 1938, from Mr. Thomas J. Eney to Mr. W. L. Thurmond and ask it be marked Plaintiff's Exhibit—

Clerk: 9.

Mr. Taylor: (Reads.)

“Joint Protective Board, Union Pacific Railroad Brotherhood Railway Carmen of America.

Office of Thomas J. Eney, General Chairman,
1026 W.O.W. Building, Omaha, Nebr.

June 30, 1938.

“W. L. Thurmond, Local Chairman
Local Lodge No. 612
226 South 6th Street
Las Vegas, Nevada

“Dear Sir and Brother:

“This will acknowledge receipt of your letter of June twenty-first with a copy to the executive board members the case of W. L. Olive.

“Management has refused to reinstate W. L. Olive unless he withdraws claim for compensation. Therefore, the only alternative for me, is to place same in

(Testimony of Thomas E. Eney.)

the hands of the Grand Lodge for [135] their disposal to the adjustment board.

“Fraternally yours,
THOMAS J. ENEY,
General Chairman, J.P.B.”

Q. Referring, Mr. Eney, to the letter which has just been introduced and which I just read to the jury, that letter conformed to the probable facts at that time, didn't it?

A. Well, to the extent that what it was written, what it says in that letter that—

Q. That is, you stated the truth in that letter?

A. Well, the only thing that I could never determine just exactly how much money was involved in the case.

Mr. Taylor: I do not believe that is responsive.

Q. You stated the truth, Mr. Eney, to Mr. Thurmond at that time?

A. All right. The letter speaks for itself.

Q. You wouldn't try to mislead Mr. Thurmond, would you?

Mr. McNamee: That is objected to.

The Court: He has written the letter. His signature is there, counsel. The letter speaks for itself.

Mr. Taylor: That is all.

Mr. McNamee: That is all.

The Court: I would like to know what explanation you have to make about this letter in your testimony of yesterday.

(Testimony of Thomas E. Eney.)

A. Well, the amount what is involved, whether it would satisfy the claimant, is the question at issue.

The Court: But you said in this letter the company would not reinstate this man unless he waived compensation for back pay. You stated yesterday, if I remember correctly, in effect that the company offered to reinstate him and that the question of back pay would be adjusted in regular course.

A. There was a statement—

Mr. McNamee: That letter that is on file is October, 1938.

The Court: I am asking the witness a question, counsel.

Mr. McNamee: Pardon me.

A. You see after I handle the case so far and I can't get any satisfaction out of it, the question was brought before this convention in appeal by Mr. Thurmond and one of the Grand Lodge officers was present there and we went into it very thorough and I was instructed to handle it to a conclusion and that on the basis for compensation for time lost in 1935, as that previous letter stated. Well, my instructions were then to get that full amount and I can't get it according to that request at that convention, so it was a matter then for me to turn it over to the Grand Lodge. In the meantime, the company contacted me again on the case. It is a procedure, your Honor, that you have to follow out in these offices that you hold in these labor organizations. You can't do as you please about it. You are regulated by the orders of the organization. [137]

(Testimony of Thomas E. Eney.)

The Court: That is all. Any further questions?

Mr. McNamee: That is all, Mr. Eney.

Mr. Taylor: That is all.

Mr. McNamee: Your Honor please, at this time we offer what purports to be an instrument dated—

The Court: Purports to be—I want to know if it is.

Mr. McNamee: An instrument dated—signed by Williard L. Olive—

Mr. Ham: We object if it is read before the jury.

The Court: The authenticity is not questioned?

Mr. Ham: It is just a question of materiality to the issues in this case. We object to that introduction upon that ground, that it is immaterial to the issues of this case.

The Court: I will overrule the objection. Gentlemen, there has been a claim of injury here, that this man is taken out of service on account of injuries received. Now it seems to me that there is evidence of the fact that he was injured and from that the jury can determine the extent. In other words, as I view this case, there were certain periods here in which you gentlemen are in conflict as to when the plaintiff was able to return to work. Now the plaintiff claims that he was able to return to work, I believe, in 1935. According to the opening statements of counsel for the defendant, he was not able to return to [138] work until 1937. Now that is a question of fact for the jury

to determine from all the evidence. If, in other words, if we should make an award here it should be made from the year 1935 or the year 1937 and the extent of his injuries and I think to determine that fact, the jury should have that information. Therefore, the objection will be overruled.

Mr. McNamee: I would like to be permitted to substitute for the original a photostatic copy thereof.

The Court: Any objection?

Mr. Ham: No objection to the substitution without waiver of the original objection.

Clerk: Defendants' "G".

The Court: That is understood.

Mr. McNamee: At this time, if your Honor please, we desire to introduce two requests for admission to facts, one of which has a response to it.

The Court: I understand there is no objection to it?

Mr. Taylor: No, no objection to the one that has a response.

The Court: It may be admitted.

Mr. McNamee: Request for Admission of Facts dated February 21, 1945 and received for that date, together with Response to it.

The Court: It may be admitted as one exhibit.

Clerk: Defendants' "H".

The Court: I think the Admission should be read to the jury now so we will know what we are talking about.

Mr. McNamee: At this time I want to read to the jury Defendants' Exhibit "G". The top of

the instrument is in the name of the Union Pacific System. It is entitled, "Release of All Claims." (Reads)

"Received of Los Angeles & Salt Lake Railroad Company Five Thousand Dollars (\$5,000.00)

"In consideration thereof, I hereby release Los Angeles & Salt Lake Railroad Company and all other companies, partnerships and persons from all claims or causes of action that exist or may hereafter accrue, for damages for any and all personal injuries, including possible unknown injuries, and for complications arising from such injuries or treatment thereof: for loss of services; for medical or other expenses: and for loss and damage to property; growing out of an accident occurring on or about twenty-fifth day of February, 1934, at or near Las Vegas, Nevada, resulting in personal injuries to me while a Car Inspector.

"The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made. [140]

"I Have Read the Foregoing Receipt and Release and Fully Understand the Same. I have read the foregoing receipt and release and fully understand the same.

"Dated Las Vegas, Nevada, May 4th, 1935.

(Signed) WILLARD L. OLIVE

Las Vegas, Nev May 4th 1935

"Witnesses: Mary Carol Melton, C. C. Boyer Jr, John R. Emplun, M. L. Clark 5/4/35"

This is a Request for Admission of Facts, addressed to the plaintiff and plaintiff's attorneys, Exhibit "H":

(Reads) "Please Take Notice: That the Defendants, Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and Willard T. Morley, request the Plaintiff, W. L. Olive, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

"That each of the following statements is true.

"I.

"That throughout the months of December, 1936 and January, 1937, one L. R. Jarrett was Vice Chairman of the Local Protective Board of Brotherhood Railway Carmen of America, at Las Vegas, Nevada.

"II.

"That throughout the year 1937, one W. L. Thurmond was Chairman of the Local Protective Board of Brotherhood Railway Carmen of America, at Las Vegas, Nevada.

"III.

"That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was [141] General Chairman of Brotherhood Railway Carmen of America.

“IV.

“That before the commencement of this action, Plaintiff’s case for his claimed unlawful suspension from service and discharge from service, by the Defendants, was, at Plaintiff’s request and pursuant to Rule 35 of Agreement dated November 1, 1934, marked Exhibit “A” and made a part of Plaintiff’s Complaint, taken to the Foreman, General Foreman, and Master Mechanic, each in their respective order, by the authorized local Committee of said Brotherhood Railway Carmen of America, which Committee was also known as and called “Local Protective Board of Brotherhood Railway Carmen of America”, and that said L. R. Jarrett, W. L. Thurmond, and Thomas J. Eney, were respectively, the representatives of said local Committee.

“Dated this 21 day of February, 1945.

“LEO A. McNAMEE
FRANK McNAMEE, Jr.

By (Signed) LEO A. McNAMEE
Attorneys for Defendants.

“Receipt of a copy of the foregoing Request for Admission of Facts, admitted this 21 day of February, 1945.

“HAM & TAYLOR
By (Signed) RYLAND G. TAYLOR
Attorneys for Plaintiff.”

In response to that the plaintiff admits statements I, II, and III. (Reads.)

“II.

“In response to statement IV Plaintiff admits that Thomas J. Eney was a representative of the Local Protective Board of Brotherhood Railway Carmen of America. Plaintiff states that on November [142] 5, 1936, he submitted his case to the Local Protective Board of Brotherhood Railway Carmen of America and Plaintiff is informed that the said Board reported the case to the General Foreman and Master Mechanic but Plaintiff alleges that his claim was not given an investigation by the said General Foreman or Master Mechanic nor was he given any hearing whatsoever or at all.

“HAM & TAYLOR
By (Signed) RYLAND G. TAYLOR
Attorneys for Plaintiff.”

At this time, if your Honor please, defendants offer “Request for Admission of Facts Pertaining to the Third Defense set forth in the Answer.”

Mr. Taylor: A request we admit the qualifications of the corporation during that period as set forth in the third defense. The third defense was stricken. Your Honor sustained the motion to strike as to the third defense.

The Court: I simply held it was within the statutory period. This action was based upon a contract in writing and therefore the statute of limitation I am not going to follow. I held it is within the statutory period.

Mr. Taylor: And secondly this admission or

denial would be immaterial because it goes solely to the third defense. [143]

The Court: It may be admitted and marked. In other words, it follows your allegation as to the corporation——

DEFENDANT'S EXHIBIT "I"

REQUEST FOR ADMISSION OF FACTS

To: W. L. Olive, Plaintiff, and to Messrs. Ham & Taylor, Attorneys for Plaintiff:

Please Take Notice: That the Defendants, Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and Willard T. Morley, request the Plaintiff, W. L. Olive, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

That each of the following statements is true.

I.

That prior to August 20, 1936, each of said Defendant corporations filed a certified copy of its Articles of Incorporation, and a certified copy of all of the Amendments thereto, in the office of the Secretary of State of the State of Nevada, and ever since prior to August 20, 1936, these Defendant corporations have each kept on file in the office of the Secretary of State of the State of Nevada, a certified copy of its Articles of Incorporation,

and a certified copy of all of the amendments thereto. That prior to August 20, 1936, said Defendant corporations also each filed a certified copy of its Articles of Incorporation, and of all amendments thereto, as certified by the Secretary of State of the State of Nevada, in the office of the County Clerk of the County of Clark, State of Nevada, in which County the principal place of business of each of said Defendant corporations in the State of Nevada, is located.

That prior to August 20, 1936, each of said Defendant corporations appointed, and have ever since kept and maintained in the State of Nevada, a resident agent upon whom process may be served.

That on or before the 1st day of July of each of the years 1936, 1937, 1938, 1939, and 1940, each of the Defendant corporations filed with the Secretary of State of the State of Nevada, a list of its officers and its Directors of, and a designation of its resident agent, in the State of Nevada, and a certificate of acceptance signed by its resident agent so designated, which said list of officers and designation of resident agent was certified by one of its officers, and upon the filing of each of said lists, paid to the said Secretary of State, a fee of \$5.00.

Dated: This 2nd day of March, 1945.

LEO A. McNAMEE

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Defendants.

Receipt of a copy of the foregoing Request for Admission of Facts, admitted this 2 day of March, 1945.

HAM & TAYLOR
By RYLAND G. TAYLOR
Attorneys for Plaintiff.

No. 160. U. S. District Court, Nevada. W. L. Olive, Plaintiff vs. Union Pac. R. R. Co., et al. Deft's. Exhibit No. "I". Filed Mar. 20th, 1945. O. E. Benham, Clerk.

[Endorsed]: Filed March 20, 1945.

Mr. McNamee: That is right.

The Court: And the plea of statute of limitations is based upon an oral agreement and therefore barred from statute of limitations. I hold that this is an action based upon a written contract and therefore the statute of limitation can not hold. It may be admitted.

Clerk: Defendants' "I".

Mr. McNamee: I would like to call Mr. Olive under the statute.

MR. OLIVE,

having been previously sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. When you were injured in February, 1934,

(Testimony of W. L. Olive.)

Mr. Olive, what did that injury consist of?

A. I don't know exactly. I sustained a broken arm and pretty badly shaken up.

Q. Were you treated? A. Yes sir.

Q. By the company doctors? A. Yes sir.

Q. Were you taken into Los Angeles to the hospital? A. Yes sir. [144]

Q. How long were you in there?

A. Six weeks.

Q. And then you returned to Las Vegas and how long was your arm in a sling?

A. Oh, it was about six weeks in Los Angeles and six weeks in Long Beach and then I came back here. I carried it in a sling for four months.

The Court: What part of your arm was broken?

A. The upper humerus.

Q. Did the doctors tell you just what that fracture was called?

A. Compound fracture, he told me.

The Court: Did it involve the elbow anywhere?

A. Yes.

The Court: Was the break in the elbow?

A. It was just midway between the elbow and shoulder and there was restriction in the elbow for quite some time. It finally left so that I can use it all right.

The Court: Do you have the same good use of it now as you ever had?

A. Yes sir.

Q. Did they ever call it a comminuted fracture?

A. Not that I recall.

(Testimony of W. L. Olive.)

Q. You didn't hear it called that? A. No.

Q. They called it a compound fracture?

A. Yes. [145]

Q. Was your back injured at the same time?

A. Yes, I was pretty badly shaken up.

The Court: Did you fall?

A. I fell from the top of one of their cars.

The Court: Box car?

A. Passenger car.

Q. You fell clear from the top down to the platform? A. Yes sir.

Q. Did it cause you to be nervous also?

A. Yes sir.

Mr. McNamee: I think that is all.

Mr. Taylor: No cross-examination.

The Court: Did you have any lawsuit with the railroad company for this settlement or did you finally get together yourselves?

A. Why we negotiated a favorable settlement, wherein I was to return to work and I received half of the amount that I had originally asked for, which was \$10,000.00 and I expected to return to work.

The Court: But you didn't have any lawsuit or any disagreement with the company?

A. No.

The Court: You had a peaceful adjustment?

A. No.

The Court: So there was no hard feelings between you and the railroad company over this accident? [146]

(Testimony of W. L. Olive.)

A. That is right, sir.

Q. You say that there was an agreement that you return to work but that statement you signed said there wasn't any such promise to return to you to work.

The Court: That is argumentative, counsel.

Mr. McNamee: That is all.

Mr. Taylor: That is all. [147]

Mr. McNamee: I wish to recall Mr. Knickerbocker.

MR. KNICKERBOCKER,

having been previously sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Mr. Knickerbocker, in regard to employees passing physical examinations, what was the rule of the company as to who should pass on their physical ability?

Mr. Taylor: We object upon the grounds and for the reason that the rule itself is the best evidence.

The Court: If it is a written rule. Are the rules in evidence?

Mr. McNamee: Yes.

The Court: It is the best evidence.

Mr. McNamee: The rule states that they must pass satisfactory examination and I just wanted to

(Testimony of F. H. Knickerbocker.)

know who must state whether or not the examination is satisfactory.

Mr. Taylor: His Honor has stated the rule is the best evidence.

The Court: The rules speak for themselves, counsel.

Q. I will ask you to state, Mr. Knickerbocker, whether or not the railroad company would accept the report of a doctor other than the railroad company doctors? A. No sir.

Q. How many doctors did the railroad company have at that time?

Mr. Taylor: That is immaterial.

The Court: A big railroad company has lots of doctors. [148]

Mr. McNamee: Well, that is all.

The Court: Any questions?

Mr. Taylor: Just a moment.

Cross-Examination

By Mr. Taylor:

Q. In other words, you wouldn't accept the opinion of any doctor, even your own family physician, if he is not a railroad doctor?

A. Under the rules—

Q. That isn't the question. I asked you if you would, as a matter of practice, accept the opinion of any doctor other than a railroad company doctor?

A. No sir.

Mr. Taylor: That is all.

Mr. McNamee: That is all. Defendant rests.

REBUTTAL TESTIMONY

MR. OLIVE

was called on rebuttal, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Mr. Olive, referring to your examination by Dr. Landenberger in Salt Lake City in October of 1935, briefly of what did that examination consist?

A. Well, he examined my eyes and my ears and examined my arm and blood pressure and then asked me if I felt I was able to go back to work and I believe I answered him yes, that I was. He asked me if my arm was all right and I chinned myself on his door frame. He said, "I guess it is all right." He said however I should take a routine examination from Dr. Slavin when I returned to Vegas.

Q. Do you recall on or about April 30, 1938, sending Mr. Eney a telegram addressed to Los Angeles? A. Yes sir.

Q. I will call your attention to this copy here and ask you if that is a copy of the wire you sent to Mr. Eney? A. It is sir.

Mr. McNamee: We object, if your Honor please. It is apparently a dispute between the plaintiff and his labor organization and I do not think the railroad company should be penalized for any neg-

(Testimony of W. L. Olive.)

lect or failure to carry out the procedure prescribed— [150]

The Court: Counsel, it has already been read to the jury.

Mr. McNamee: I object to that letter going in.

The Court: It is already in because it has been read.

Mr. Taylor: The purpose of the offer if—

The Court: I am going to admit it.

Clerk: Plaintiff's 10.

PLAINTIFFS' EXHIBIT NO. 10

No. 48.

Telegram

Nite Letter to Thos. J. Eney to Los Angeles
April 30th, 1938.

You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge and their decision in black and white.

You have not personally advised me of your decision and I want that in writing from you personally before I sign anything.

Is it not possible to handle my case like other local cases are being handled and that is to let me return to work and the subject of time lost discussed at the leisure of others concerned.

Answer return wire.

W. L. OLIVE

515 Carson. [44]

(Testimony of W. L. Olive.)

The Court: It has already been read, counsel.

Mr. Taylor: Very well, sir.

Q. Mr. Olive, do you still want to return to your work, employment?

Mr. McNamee: Objected to as incompetent, irrelevant, and immaterial.

Mr. Taylor: State of mind is involved all through this case, if your Honor please.

Mr. McNamee: Well, there are several things involved, if your Honor please. At this time now he has brought an action here claiming that he has been discharged and that the agreement is all over. Consequently, it is immaterial whether he wants to go back to the railroad company now or not.

The Court: The action is on the assumption that his employment is terminated. I am going to sustain the objection to the question.

Mr. Taylor: That is all.

The Court: Any questions?

Mr. McNamee: No cross-examination.

The Court: That is all. [151]

Mr. Taylor: I would like to call Mr. Thurmond.

MR. W. A. THURMOND,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Please state your name, Mr. Thurmond.

A. William A. Thurmond.

Q. Where do you reside?

A. 225 So. 6th Street.

Q. Here in Las Vegas? A. Las Vegas.

Q. What is your occupation?

A. At the present time is wrecking engineer and locomotive carpenter.

Q. For the Union Pacific Railroad?

A. Yes sir.

Q. Are you a member of the Brotherhood of Railway Carmen of America? A. Yes sir.

Q. During the years 1934, 5, 6, 7, and 8 were you at that time a member of that Brotherhood?

A. Yes sir.

Q. Were you an officer of the Local organization during that period? A. Local chairman.

Q. I invite your attention to what purports to be a copy of a telegram sent by you to Mr. Eney on December 28, 1937, and ask [152] you if by reading that copy it refreshes your memory and you can state then whether or not you sent such a wire to Mr. Eney? A. Yes sir, I did.

Mr. McNamee: We object to that, if your Honor please, on the ground it is between the plaintiff and his agent and is not binding upon the defendants.

(Testimony of W. A. Thurmond.)

Mr. Taylor: It is an impeachment of the statement made by the witness Eney yesterday, tends to an impeachment.

The Court: Wherein is this an impeachment of the testimony of Mr. Eney?

Mr. Taylor: Mr. Eney wasn't definite as to time—

The Court: As I remember his testimony it was in the fall of 1938. He testified, if I remember correctly, that there was a period of time that the company would not take back Mr. Olive without a waiver, but that in the fall of '38, I believe he gave the month as October, that the company at that time agreed to take Mr. Olive back and this is dated 1937. I don't see where this impeaches his testimony in any way, counsel. However, I am going to admit it. I will let the jury pass upon that question.

Clerk: Plaintiff's 11.

The Court: Any further questions?

Mr. Taylor: If your Honor please, I overlooked reading this to the jury. This, gentlemen, is Plaintiff's Exhibit 11. [153]

(Reads)

"Las Vegas Nevada December 28 1937

"T J Eney

Rome Hotel

Omaha Nebraska

"Norton Requested Conference With Local Committee Today Case W L Olive Stop Norton Willing

(Testimony of W. A. Thurmond.)

Reinstate But Requested Signatures Olive and Committeemen on Waiver of Wage Claim Stop Mr Olive Willing Make Some Concession on Wage Settlement Provided He Is Returned Service Immediately Letter Following

W L THURMOND”

The Court: Any questions?

Mr. McNamee: No cross-examination.

The Court: That is all.

Mr. Taylor: Plaintiff rests.

The Court: Both sides rest now?

Mr. McNamee: Both sides rest now.

The Court: We will take a 5-minute recess at this time. Gentlemen of the jury, you will bear in mind the admonition of the Court heretofore given.

(Recess taken at 11:09 A. M.)

11:20 A. M.

The Court: It is now 11:20. I am going to allow three-quarters of an hour for each side to argue but they may divide that up as they see fit.

At 11:55 jury admonished and recess taken until 2:00 P. M. [154]

In Chambers—2:08 P. M.

Attorneys present.

The Court: Let it appear that counsel for the defendant excepts to the instructions wherein I have stated, among other things, that "If you find from the evidence that during plaintiff's employment with said defendant railroad companies, that said railroad companies had in effect a rule providing that employees who have been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that plaintiff had an accident on the 25th day of February, 1934, which resulted in an injury to him which at that time incapacitated him from performing the duties of railway carman, and if you further find that he was examined by doctors * * *, the defendant excepts to this instruction on the ground that I failed to give the instruction "railroad company doctors" and that it is the defendants' position that the plaintiff had to be passed by the railroad company doctors and that the Court can so instruct. Also excepts for the failure to give requested D10 and the Court's ground for refusing that is that it is covered by other instructions.

2:12

Presence of the jury stipulated.

Argument proceeds. [155]

INSTRUCTIONS

The Court: Members of the jury, you have listened to the evidence, you have listened to the arguments of counsel, and now you are going to have to listen to me for a while, while I give you instructions governing the law of this case as I understand it.

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus invested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as stated to you.

The burden of proof in this class of case is always upon the party holding the affirmative. Any matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence and the Court instructs you, as a matter of law, that the burden of proof is upon the plaintiff and it is upon him to prove his case by a preponderance of the evidence.

You are the sole judges of the credibility of witnesses and of the facts in this case. You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration

of a lesser number of witnesses or a presumption or other evidence which appeals to your mind with more convincing force. This [156] rule does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not the relative number of witnesses, but it is the relative convincing force of the evidence.

In every civil action, as this one is, the burden is on the plaintiff to prove his case by a preponderance of the evidence. Preponderance of the evidence means the greater weight of the creditible evidence as you find it to be. In your final estimate, this evidence is equally balanced as to the important facts. On the other hand, any preponderance of the evidence, however, slight, in the plaintiff's favor requires a verdict favorable to him.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute of the record without an inference or presumption and which in itself if true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by providing another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions

and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless it is declared by law, it may be controverted [157] by other evidence, direct or indirect, but unless so controverted, the jury is bound to find according to the presumption. An inference is an assumption which a reasonable jury draws from the facts proved. This must be founded upon a fact or facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the persons whose act is in question, the course of the business or course of nature. The word "propensity" as used in this instruction means "natural or habitual inclination or tendency."

A fact proven to your satisfaction by proof of circumstances from a consideration of various items of indirect evidence, is nonetheless as effectively established as though it depended upon direct evidence. Such circumstances must be connected in such a way as to confer and lead directly to the conclusion which may be indicated thereby.

If, after consideration of all the evidence, you conclude that any witness has sworn wilfully, falsely, as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, insofar as the same is not corroborated by other credible evidence or by facts and circumstances in the case.

The Court instructs the jury that the following facts must be taken as true in this case: That for a

period of more than 10 years immediately prior to January 1, 1935, plaintiff had been employed by Los Angeles & Salt Lake Railroad Company as a car [158] repair man and car inspector at Las Vegas, Nevada. On the first day of November, 1934, while so employed, plaintiff was a member of the labor organization known and called the Brotherhood Railway Carmen of America; that on November 1, 1934, the Brotherhood Railway Carmen of America was a recognized and authorized bargaining agent for the carmen employees of the defendant railroad companies, respectively. That on the first day of November, 1934, said Brotherhood Railway Carmen of America entered into an agreement in writing the Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, a copy of which has been introduced in evidence and made a part of the evidence herein, which said agreement set forth rights and duties of said corporation and the said Brotherhood Railway Carmen of America, and that said agreement, among other things, provided as follows:

No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found

that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. (Rule 37)

No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, [159] neither shall an employe be discharged for any cause without first being given an investigation. (Rule 38).

That from about February 1, 1934, to about January 1, 1936, Dr. Hale B. Slavin was the local doctor in Las Vegas, Nevada, for the Los Angeles & Salt Lake Railroad Company, and that from about January 1, 1936, to about January 1, 1939, said Dr. Hale B. Slavin was the local doctor in Las Vegas, Nevada, for Union Pacific Railroad Company, and the medical officer who was authorized to treat and administer to the local company employees. That from about January 1, 1935, to about January 1, 1937, Dr. J. C. Landenberger of Salt Lake City, Utah, was an authorized doctor for the Union Pacific Railroad Company, a corporation, and authorized to examine, treat and administer aid to employees of the Union Pacific Railroad Company. That from about January 1, 1936, to January 1, 1937, a Dr. Brown was an authorized doctor for the Union Pacific Railroad Company, and on or about March 20, 1936, one W. Maydahl was a car foreman in the local Las Vegas shops of the Union Pacific Railroad Company, and on or about October 20, 1936, one G. H.

Berry was a master mechanic for the Union Pacific Railroad Company, and that on or about October 20, 1936, Mr. F. H. Knickerbocker was an official of the Union Pacific Railroad Company. That throughout the month of December, 1936, to January, 1937, one L. R. Jarret was Vice-Chairman of the Local Protective Board of Brotherhood Railway Carmen of America at Las Vegas, Nevada. That throughout the year 1937, one W. L. Thurmond was Chairman [160] of the Local Protective Board of Brotherhood Railway Carmen of America at Las Vegas, Nevada. That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was General Chairman of Brotherhood Railway Carmen of America.

That before the commencement of this action plaintiff's case for his claimed unlawful suspension from service and discharge from service by the defendant railroad company was at plaintiff's request, and pursuant to Rule 35 of Agreement, dated November 1, 1934, heretofore introduced into evidence, taken to the general foreman and master mechanic, each in their respective order, by the authorized local committee of the Brotherhood Railway Carmen of America, which committee was also known as and called Local Protective Board of Brotherhood Railway Carmen of America. That L. R. Jarret, W. L. Thurmond, and Thomas J. Eney were respectively the representatives of said local committee.

This last instruction has been given due to ad-

missions in the agreement between the parties as to certain facts that have been agreed upon and no proof is required of those facts admitted by the pleadings or stipulated to by the parties; therefore, that is the reason I stated that you must accept the former statement as true because the parties have stipulated or admitted in writing these facts.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult [161] with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under the instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous.

You are instructed that any finding or findings of fact made by you must be based upon a preponderance of the evidence legally admitted or on stipulation of the parties or derived from an inference or presumption which can be legally drawn by the fact or facts established by competent evidence.

As I have heretofore said, you are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. You may take into consideration their interest, bias, or prejudice, if any, their relationship to the parties and to the case, if any, the probability or improbability of the story

related by them and any and all other facts and circumstances in evidence which in your judgment may add to or detract from their credibility or the weight of their testimony.

If you find from the evidence in this case that the plaintiff had an employment agreement with the defendants as alleged in plaintiff's complaint and amendment thereto, and that the defendants, or either of them, wrongfully discharged plaintiff, as alleged, in violation of the terms of said agreement, then it is your duty to find for the plaintiff and assess such [162] damages as you find the plaintiff suffered as a result of such wrongful discharge not exceeding the sum of \$64,742.08, the sum payed for in the plaintiff's complaint.

Testimony taken by deposition should receive the same consideration and weight at the hands of the jury as if the witness had testified on the stand in your presence.

If you find from the evidence that the defendants wrongfully suspended or discharged plaintiff on or about the 20th day of October, 1936, and you also find that after said date the defendants offered to reinstate plaintiff in his same position without prejudice to plaintiff's rights under his original contract of employment, then I instruct you that plaintiff can not recover for any wages lost by him from the time of such offer of reinstatement without prejudice to any claims for lost time he might claim from his employer or employers.

In other words, ladies and gentlemen, there has

been a conflict here in the evidence and you have heard the evidence. If you believe the plaintiff in this case was offered reinstatement without prejudice in October of 1938, that would be the limit of the companies' liability. In other words, any claim he has after that date would be eliminated and you must eliminate it. It is based, of course, upon the theory that a man is supposed to return to work when his employment is offered to him.

As I stated in other instructions, if you find that the plaintiff was wrongfully discharged by the defendants, then I instruct you that it was plaintiff's duty to seek similar employment [163] elsewhere in the same locality and thereby save himself harmless if he was reasonably able to do so. But if the plaintiff was unable, after a reasonable time, to obtain employment in the same locality of a similar nature to that in which he was employed at the time of his discharge, then he was bound to seek and accept some other kind of work for which he was fitted, in order to mitigate or reduce his damages. In other words, it was the duty of the plaintiff in this case to seek other employment that he was capable of doing and thereby mitigate or reduce any claim for damages that he might have against the defendants.

If you find from the evidence that plaintiff was unable physically to perform the duties of carman with safety to himself and others, on account of the condition of his arm, then the defendants had the right to suspend him from such service during the period such inability existed.

If you find from the evidence that during plaintiff's employment with said defendant railroad companies that said railroad companies had in effect a rule providing that employees had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that plaintiff had an accident on the 25th day of February, 1934, which resulted in injuries which at that time incapacitated him from performing the duties of railway carman, and if you further find that he was examined by doctors from time to time thereafter, [164] who found in good faith that plaintiff was so disabled by reason of said injuries as to interfere with the proper performance of his duties with safety to himself and others, then I instruct you that defendants were not liable to plaintiff for suspending him from service during the time plaintiff was found in good faith by said doctors to be so disabled as to so interfere with the proper performance of his duties with safety to himself and others. In other words, during the time that the plaintiff was so disabled by reason of his physical condition that he was unable to properly perform his duties with safety to himself and others, he was not entitled to reinstatement and such period should be eliminated from your consideration in fixing damages, if you find the plaintiff is entitled to recover.

The fact that I have instructed you on the subject of damages and submitted for your consideration a form of verdict which refers to damages, if any you find, is not to be taken by you as an indi-

cation that I believe the plaintiff is entitled to recover. This is a question of fact for your determination under all of the evidence in the case considered in connection with the instructions given you by the Court as to the law.

It is the Court's duty to instruct you as to all the law applicable to this case. It is your duty to determine whether or not the plaintiff is entitled to recover, basing your conclusion on all the evidence that has been presented to you herein, and weighing it and considering it under the rules stated [165] to you in these instructions. Anything that I may have said in any instruction which I have given you is not to be regarded by you as in any way indicating the belief or lack of opinion on my part as to the existence or non-existence of any fact or circumstance which has been submitted to you for decision.

You entered upon your duties as jurors in this case by taking a solemn oath that you would a true verdict render according to the evidence. That duty and obligation are performed only when a verdict is rendered which is in accordance with the evidence. While you have a right to use your knowledge and experience as men in arriving at a conclusion as to the weight of evidence and credibility of witnesses, yet your finding and decision must rest upon and find support in the evidence alone. You have seen the witnesses, heard their testimony, will listen to the arguments of counsel and will have heard the charge of the Court. You must consider all of the evidence in connection with the law as given you and there-

from reach a decision. In so doing, you must patiently and conscientiously, without fear, favor or affection, bias, prejudice or sympathy, compare, weigh and consider all the facts and circumstances shown by the evidence, with the sole fixed and steadfast purpose of doing equal and exact justice between the plaintiff and defendants.

In approaching the question and retiring to your jury room, the first question that you are going to have to determine among yourselves is whether or not the plaintiff was improperly discharged. If you find that he was not, that ends your discussion. [166] If you find that he was improperly and illegally discharged, then it is for you to determine, first how long did that period exist? Was he offered employment in good faith and opportunity to return to work without the necessity of waiving any claim he might have or not? In other words, you are to determine first whether he was illegally discharged and the period of time over which that discharge exists. If you find it exists up to the present date or for any period of time, then it is for you to determine the amount. As a matter of fact, it is your duty, if you find for the plaintiff, to fix the amount. The point I am trying to impress upon you is the first necessity of determining whether or not the plaintiff was improperly or illegally discharged. If he wasn't, then of course that ends it. Plaintiff is not entitled to recover. If you then find he was improperly or illegally discharged, then it is for you to determine the amount of damages that will com-

pensate him as damages by reason of the illegal or unlawful discharge.

You are instructed if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestions. I have not expressed or intended to express, nor have I intimated nor intend to intimate any opinion as to what witnesses are, or are not, worthy of credence; what facts are or are not established, or what inference should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to [167] any of these matters, I instruct you to disregard it.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reasons for the objection.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. [168]

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you when it has been agreed upon. You will then return into court with the verdict and your foreman will represent you as your spokesman in the further conduct of this case in this court.

Two forms of verdict have been prepared for your convenience. One reads as follows: We, the jury in the above-entitled action, find for the above-named plaintiff and against the above-named defendants and assess plaintiff damages at (blank) dollars. The other proposed verdict for your consideration is: We, the jury in the above-entitled case, find in favor of the defendants above-named and against the above-named plaintiff.

Any exceptions, gentlemen, outside of the one that has been heretofore made?

Mr. Taylor: None on account of the plaintiff, if your Honor please.

Mr. McNamee: None on account of the defendant.

- (Jury retired at 3:10 P. M.) [169]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, W. L. Olive, Plaintiff, vs. Union Pacific Railroad Company, et al, Defendants, No. 160, held in Las Vegas, Nevada, on the 19th and 20th days of March, 1945, and that the foregoing pages, numbered 1 to 122, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 28, 1945.

MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed Sept. 11, 1945. [170]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled action, find for the above named plaintiff and against the above named defendants, and assess plaintiff's damages at \$8675.40 Dollars.

Dated: March 20, 1945.

IRA J. EARL
Foreman.

Filed March 20, 1945. O. E. Benham, Clerk.

[Title of District Court and Cause.]

JUDGMENT ON VERDICT

This cause came on regularly for trial on the 19th day of March, 1945, Messrs. Ham & Taylor appearing as attorneys for the plaintiff and Leo A. McNamee, Esquire appearing as attorney for the defendants.

Thereupon a jury of twelve was duly selected, impaneled and sworn to try the said cause and witnesses on the part of the plaintiff and defendant were duly sworn and testimony introduced. After hearing the evidence, the argument of counsel and instructions by the Court, the cause was submitted to the jury on the 20th day of March, 1945, who

retired to deliberate upon their verdict, and subsequently returned into Court and being polled, answered to their respective names and then and there rendered the following verdict, which was accepted by the Court and entered on the minutes thereof:

VERDICT

Therefore, by virtue of the law and by reason of the premises aforesaid:

It Is Ordered, Adjudged and Decreed: That the Plaintiff, W. L. Olive, have and recover from the Defendants, Union Pacific Railroad Company; a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, the sum of Eight Thousand Six Hundred Seventy-five and 40/100 Dollars (\$8,675.40), with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in this action.

The costs accrued in this action amount to the sum of \$68.85, which said sum was written this 26 day of March, 1945, in the space reserved for the insertion of the amount of such costs.

Dated and done in open Court this 26 day of March, A. D., 1945.

/s/ BEN HARRISON

District Judge of the United
States, Presiding.

Approved as to form, this 26th day of March,
1945.

LEO A. McNAMEE

Attorney for the Defendants.

Filed March 27, 1946. O. E. Benham, Clerk. By
J. P. Fodrin, Deputy.

[Title of District Court and Cause.]

ALTERNATIVE MOTION FOR JUDGMENT,
OR NEW TRIAL

Come now the Defendants, Union Pacific Railroad Company, and Los Angeles & Salt Lake Railroad Company, and file their Motion, praying that the Jury's verdict herein and the Judgment rendered and entered thereon, be set aside and Judgment entered herein for the Defendants, notwithstanding the verdict, and their Motion for New Trial in the Alternative, and as grounds therefor, state:

I.

Grounds for Motion for Judgment, notwithstanding verdict:

(a) It appears from the uncontradicted evidence admitted at the trial, that Plaintiff's cause of action was based upon an oral contract and it was therefore barred by the Statute of Limitations, as alleged in the third defense set forth in the Defendants' Answer;

(b) The Court erred in its decision to the effect

that Plaintiff's cause of action was founded upon an instrument in writing, to-wit: the Collective Bargaining Agreement admitted in evidence as Plaintiff's Exhibit 2.

II.

Grounds on Motion for New Trial:

Defendants move the Court to set aside the verdict rendered in the above entitled action, on the 20th day of March, 1945, and to grant a new trial, on the following grounds:

- (a) The verdict is contrary to law;
- (b) The evidence was insufficient to justify the verdict, in that it appears from all the evidence introduced at the trial without contradiction, that the Defendants offered to reinstate Plaintiff in his same position, without prejudice to Plaintiff's rights under the original contract of employment, not later than October 21, 1938;
- (c) The Court erred in overruling Defendants' objections to the introduction of Plaintiff's Exhibits Nos. 7, 9, 10, and 11, respectively;
- (d) The verdict is excessive and appears to have been given under the influence of passion and prejudice;
- (e) The Court erred in refusing to instruct the Jury as requested by the Defendants, as follows:

"If you find from the evidence that during Plaintiff's employment with said Defendant Railroad Companies that said Railroad Companies had in

effect a rule providing that employees who had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that Plaintiff had an accident on the 25th day of February, [172] 1934, which resulted in an injury to him which at that time incapacitated him from performing the duties of Railway Carmen, and if you further find that he was examined by Railroad Company doctors from time to time thereafter who, in good faith, found that Plaintiff was so disabled by reason of his said injuries as to interfere with the proper performance of his duties, with safety to himself or others, then I instruct you that Defendants were not liable to Plaintiff for suspending him from service during the time Plaintiff was so found to be so disabled as to interfere with the proper performance of his duties with safety to himself and others."

This Motion is based upon the records and proceedings in this action.

LEO A. McNAMEE,
Attorney for Defendants.

Fired March 27, 1945. O. E. Benham, Clerk. By
J. P. Fodrin, Deputy.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Messrs. Ham & Taylor, Attorneys for Plaintiff,
Las Vegas, Nevada:

Please Take Notice: That the undersigned will bring the attached Motion on for hearing before this Court, at the Courtroom of the United States District Court, in the Federal Building, in the City of Las Vegas, Clark County, Nevada, on Thursday, the 29th day of March, 1945, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated: this 27th day of March, 1945.

LEO A. McNAMEE

Attorney for Defendants.

Service of the foregoing Notice of Motion, together with the Motion attached thereto, is hereby acknowledged this 27th day of March, 1945, and the shortening of the usual five days' notice of said Motion is hereby agreed to.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff. [173]

Received and Filed March 27, 1945. O. E. Benham, Clerk By J. P. Fodrin, Deputy.

In the District Court of the United States
in and for the District of Nevada

No. 160

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a
corporation, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a corporation, and
WILLIAM MORLEY,

Defendants.

φ
MEMORANDUM OPINION

The defendants moved for a new trial on numerous grounds, which were directed to be submitted on briefs. In the brief submitted by defendants, the only ground urged is the sufficiency of the evidence to sustain a verdict in excess of \$2250.00. Defendants insist that the plaintiff was given the opportunity to return to work without prejudice on or prior to October, 1938. This the plaintiff emphatically denied. In this regard the evidence was exceedingly conflicting and, in my opinion, it presented a jury question. To grant a new trial would be substituting my judgment for that of the jury. It was very apparent, not only from the cold record, but from the very atmosphere of the case that the defendants at no time had offered the plaintiff a bona fide opportunity to return to work. There is no question that the plaintiff was ready and anxious to return to the only occupa-

tion he was fitted for. The court recognizes, as the jury must have recognized, that the defendants were desperate for skilled workmen during this period, yet, for some unknown reason, the plaintiff did not return to work. The jury found that the fault was with the defendants, hence the verdict in favor of the plaintiff.

Motion for new trial denied.

Dated: This 22 day of May, 1945.

BEN HARRISON J.

Received and filed May 24, 1945. O. E. Benham,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given: That Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Defendants, above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action on March 26, 1945.

Dated: August 17, 1945.

LEO A. McNAMEE and

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Appellants.

[Endorsed]: Filed Aug. 20, 1945. [176]

[Title of District Court and Cause.]

BOND ON APPEAL

SUPERSEDEAS BOND

Know All Men By These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of Nevada, as, Surety, is held and firmly bound unto W. L. Olive, Plaintiff, above named, and to his executors, administrators and assigns, in the full and just sum of Twelve Thousand (\$12,000.00) Dollars, for the payment of which well and truly to be made, said surety binds itself, its successors and assigns, firmly by these presents.

The conditions of the above obligation are such that,

Whereas, on March 26, 1945, in an action pending in the United States District Court, in and for the District of Nevada, between W. L. Olive, as Plaintiff, and Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, as Defendants, a Judgment was rendered against said Defendants, and the said Defendants having filed a Notice of Appeal from said Judgment, to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Union Pacific Railroad Company, a corporation, and said Los Angeles & Salt Lake Railroad Company, a corporation, shall prose-

cute their appeal to effect, and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or [177] shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this obligation to be executed and its corporate seal to be hereto affixed by its proper officers thereunto duly authorized, this 20th day of August, 1945.

CONTINENTAL CASUALTY
COMPANY.

By A. W. BIKKER,
Its Attorney in Fact.

The foregoing Bond is hereby approved this 28 day of August, 1945.

/s/ BEN HARRISON,
District Judge of the United
States, Presiding.

[Endorsed]: Filed Aug. 30, 1945. [178]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in sustaining plaintiff's Motion to Strike the Third Defense of Defendant's Answer.
2. The Court erred in holding that Plaintiff's cause of action was not barred by the four year statute of limitations as pleaded in Defendants' Third Defense set forth in Defendants' Answer.
3. The Court erred in refusing to give defendants' requested instruction "D-10".
4. That the evidence was not sufficient to support the Verdict.
5. That the Verdict was contrary to the evidence.
6. That the damages awarded plaintiff by the Verdict were excessive.

LEO A. McNAMEE

FRANK McNAMEE, Jr.,

Attorneys for Defendants.

Service of the foregoing Statement of Points admitted by receipt of a copy thereof, this 10th day of September, 1945.

HAM & TAYLOR,

By RYLAND G. TAYLOR,

Attorneys for Plaintiff.

[Endorsement]: Filed Sept. 12, 1945. [179]

[Title of District Court and Cause.]

ORDER

Upon stipulation of counsel, good cause appearing therefor, and upon motion of Ham & Taylor, Attorneys for the plaintiff, it is

Ordered that the plaintiff may have to and including November 16, 1945, in which to serve and file designation of additional portions of the record, proceedings and evidence to be included in the record on appeal in this action.

Dated and done this 17th day of September, 1945.

BEN HARRISON,
District Judge of the United
States, Presiding.

[Endorsed]: Filed Sept. 19, 1945. [180]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

Pursuant to the Stipulation of the parties filed herewith, It Is Hereby Ordered that the time for filing the record and docketing the appeal in the Circuit Court of Appeals, Ninth Circuit, is hereby

extended for an additional period of sixty days,
to-wit: to and including November 29, 1945.

Dated this 17th day of September, 1945.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Sept. 19, 1945. [181]

In the United States Circuit Court of Appeals
for the Ninth Circuit

On Appeal from the District Court of the United
States, in and for the District of Nevada—
Case No. 160.

UNION PACIFIC RAILROAD COMPANY, a
corporation, and LOS ANGELES & SALT
LAKE RAILROAD COMPANY, a corpora-
tion,

Appellants,

vs.

W. L. OLIVE,

Appellee.

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On motion of Appellants, and good cause appear-
ing therefor, It Is Hereby Ordered that the time
for filing the record and docketing the appeal in
the United States Circuit Court of Appeals, for the

Ninth Circuit, is hereby extended to and including December 18, 1945.

Dated this 9th day of November, 1945.

WM. E. ORR,
Circuit Judge.

A true copy.

Attest: November 14, 1945.

(Seal) /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed November 14, 1945. Paul P. O'Brien, Clerk.

[Endorsed]: Filed November 16, 1945. Amos P. Dickey, Clerk. By J. P. Fodrin, Deputy. [182]

In the District Court of the United States in and
for the District of Nevada

No. 160

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a
corporation, and LOS ANGELES & SALT
LAKE RAILROAD COMPANY, a corpora-
tion, .

Defendant.

STIPULATION AS TO RECORD ON APPEAL

Whereas, on the 10th day of September, 1945,
the defendants and Appellants served upon the

Plaintiff the designation of record to be contained in the record on appeal in said action, and filed the same with the Clerk of said Court on the 12th day of September, 1945; and

Whereas, pursuant to a Stipulation of the parties an order was made extending the time for filing said record and docketing said appeal in the Circuit Court of Appeals, to and including the 29th day of November, 1945; and

Whereas, the parties hereto have agreed as to what portions of the record, proceedings and evidence shall constitute the record on appeal in this action; Now, Therefore,

It Is Hereby Stipulation Between the Parties Hereto:

That the following "Designation of Record" be substituted for the "Designation of Record" heretofore filed by Defendants and Appellants, to-wit:

DESIGNATION OF RECORD

The record on appeal in this action shall consist of the following portions of the Record, proceedings and evidence, to-wit:

1. Complaint.
2. Petition for Removal of Cause to the United States District Court. [183]
3. Notice of Hearing on Petition for Removal.
4. Bond on Removal.

5. Order for Removal.
6. Clerk's Certificate with Record.
7. Defendants' Answer to Complaint.
8. Plaintiff's Amendment to Paragraph X of Complaint. (Omit all of Exhibits "A" thereto attached, except Rules 22, 23, 38 and 45.)
9. Defendants' Answer to Amendment to Complaint.
10. Plaintiff's Motion to Strike Paragraph III of the Second Defense and the entire Third Defense of Defendants' Answer.
11. Order of March 19, 1945, sustaining Plaintiff's said Motion to Strike. (See line 13, p. 96, to line 11, p. 97.)
12. The transcript of the evidence, two copies of which are filed herewith.
13. Defendants' requested Instruction D-10, which the Court refused to give and which is as follows:

"If you find from the evidence that during Plaintiff's employment with said Defendant Railroad Companies that said Railroad Companies had in effect a rule providing that employees who had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that Plaintiff had an accident on the 25th day of February, 1934, which resulted in an injury to him which at that time

incapacitated him from performing the duties of Railway Carman, and if you further find that he was examined by Railroad Company doctors from time to time thereafter who, in good faith, found that Plaintiff was so disabled by reason of his said injuries as to interfere with the proper performance of his duties, with safety to himself or others, then I instruct you that Defendants were not liable to Plaintiff for suspending him from service during the time Plaintiff was so found to be so disabled as to interfere with the proper performance of his duties with safety to himself and others.”

14. The Verdict.
15. Judgment.
16. Defendants' Alternative Motion for Judgment or New Trial.
17. Notice of Motion.
18. Order Denying Motion for New Trial.
19. Notice of Appeal. [184]
20. Defendants' Exhibit “C” (eliminate “1st Test—Acuteness of Vision”; “2nd Test—Color Perception”; and “3rd Test—Hearing”).
21. Defendants' Exhibit “I”.
22. Plaintiff's Exhibit 5.
23. Plaintiff's Exhibit 8 (If it appears by endorsement thereon to have been admitted in evidence).
24. Plaintiff's Exhibit 10.

25. Statement of Points on which Appellants intend to rely.

26. This Designation.

That the record on appeal in this action consist of the portions of the record, proceedings and evidence as above designated, and that the original of Plaintiff's Exhibit 2 be sent to the Appellate Court pursuant to Rule 75(i) for inspection by the Court.

Dated this 26th day of October, 1945.

LEO A. McNAMEE,
FRANK A. McNAMEE, JR.,
Attorneys for Defendants and
Appellants.

HAM & TAYLOR,
/S/ By RYLAND G. TAYLOR,
Attorneys for Plaintiff and
Respondent.

[Endorsed]: Filed Oct. 29, 1945. [185]

[Title of District Court and Cause.]

ORDER

It appearing from the Stipulation as to Record on Appeal, filed herein, that the parties to said action stipulated that the original of Plaintiff's Exhibit 2 be sent to the Appellate Court, pursuant to Rule 75(i), for inspection by the Court.

It Is Hereby Ordered that the Clerk of this Court send to the Clerk of the United States Circuit Court of Appeals, with the record on appeal herein, the original of Plaintiff's Exhibit 2, referred to in said record.

Dated this 27th day of November, 1945.

ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Nov. 28, 1945. [186]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of W. L. Olive, Plaintiff, vs. Union Pacific Railroad Company, a corporation; Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, Defendants, said case being number 160 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 188 typewritten pages numbered from

1 to 188, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the Stipulation and Designation of Record, filed in said case and made a part of the transcript attached hereto, as the same appear from the [187] originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid, except that the title of the court and cause have been eliminated in most instances.

I further certify that accompanying this record, in accordance with stipulation and order of court, is the original of Plaintiff's Exhibit No. 2, being Union Pacific System Schedule of Rules.

And I further certify that the cost of preparing and certifying to said record, amounting to \$23.85, has been paid to me by Leo A. McNamee, Esq., attorney for the appellants.

Witness my hand and the seal of said United States District Court this 30th day of November, 1945.

(Seal) AMOS P. DICKEY,
Clerk, U. S. District Court.

[Endorsed]: No. 11200. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Appellants, vs. W. L. Olive, Appellee. Transcript of Record. Upon Appeal for the District Court of the United States for the District of Nevada.

Filed December 3, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11200

UNION PACIFIC RAILROAD COMPANY, a corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation,

Appellants,

vs.

W. L. OLIVE,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF RECORD THOUGHT NECESSARY FOR THE CONSIDERATION THEREOF

Appellants hereby adopt as their points on appeal, the "Statement of Points" appearing in the Transcript of Record, and designate for printing the entire Transcript of Record.

Dated this 10th day of December, 1945.

LEO A. McNAMEE,

FRANK McNAMEE, JR.,

Attorneys for Appellants.

Service of the foregoing admitted this 11th day of December, 1945.

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[Endorsed]: Filed December 13, 1945. Paul P.
O'Brien, Clerk.



No. 11200

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

**UNION PACIFIC RAILROAD COMPANY, a corporation,
and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation,**

Appellants,

vs.

W. L. OLIVE,

Appellee.

OPENING BRIEF OF APPELLANTS

LEO A. McNAMEE,

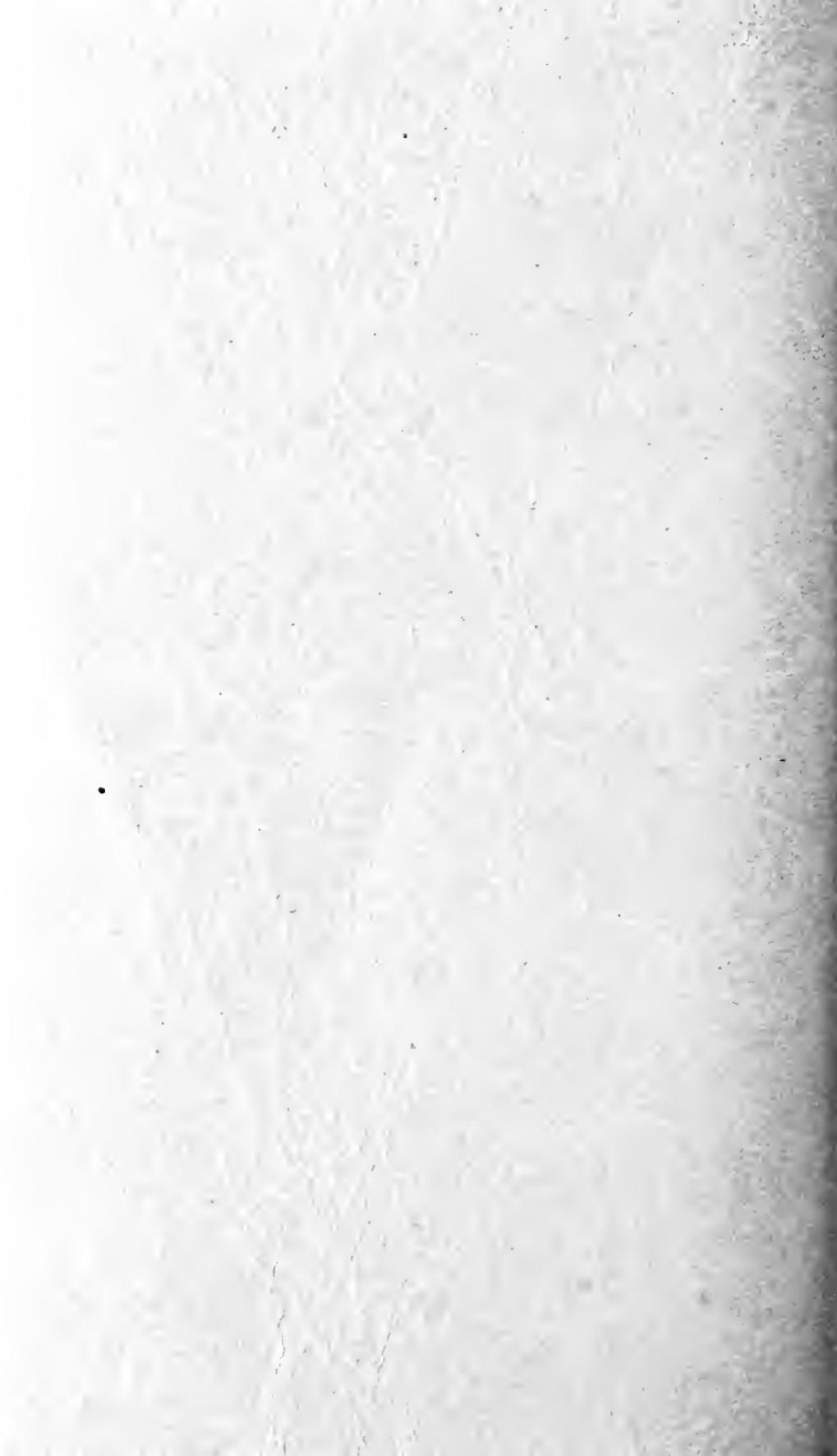
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No. 11200

IN THE

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FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation,
and LOS ANGELES & SALT LAKE RAIROAD COM-
PANY, a corporation.

Appellants,

vs.

W. L. OLIVE,

Appellee.

OPENING BRIEF OF APPELLANTS

STATEMENT OF THE CASE

On March 31, 1941, W. L. Olive, a resident of Clark County, State of Nevada, filed his verified Complaint in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to recover damages in the sum of \$64,724.08, for his alleged wrongful suspension and discharge from the service of the Union Pacific Railroad Company and the Los Angeles & Salt Lake Railroad Company, both corporations alleged to be organized and existing under and by virtue of the laws of the State of Utah.

On April 9, 1941, defendants caused said action to be removed to the United States District Court for the District of Nevada, upon the ground that the action was one of a civil nature, being an action to recover damages for an alleged breach of contraet; that the value of the matter in controversy was in excess of \$3,000,000; and that the controversy was entirely between citizens of different states. (P. R. 13-31).

Thereafter, the defendants answered the complaint,

denying the material allegations thereof, setting up estoppel as an affirmative defense, and pleading in bar the four year Statute of Limitations. (Sec. 8524, N. C. L. 1929) (P. R. 31-38.) On February 19, 1945, by stipulation of counsel and leave of Court, plaintiff filed an amendment to his complaint, which, in substance, incorporated by reference certain portions of the agreement in writing between the Brotherhood of Railway Carmen of America and the corporate defendants (P. R. 38-40). The material allegations of this amendment to plaintiff's complaint were denied by defendants in their answer, with the exception of the allegation that such agreement had been made. (P. R. 41)

On February 24, 1945, plaintiff moved to strike from defendants' answer, Paragraph III of the Second Defense, setting up certain affirmative matter not material here, and all of the Third Defense, setting up in bar the four year Statute of Limitations. (P. R. 42). The motion was submitted to the Court on briefs and oral argument of counsel, and the Court thereafter made its Order sustaining plaintiff's motion, to which Order defendants duly excepted. (P. R. 144 and 147)

By stipulation of counsel, plaintiff thereafter filed a supplement to his complaint, setting forth damages alleged to have accrued since the date of filing of his original complaint, as a result of his alleged wrongful discharge. (P. R. 12-13)

On the issues so made, a trial was had by the Court sitting with a jury, resulting in a verdict in favor of plaintiff in the sum of \$8,675.40 damages, with interest and costs. Final judgment was entered thereon on March 26, 1945. (P. R. 174-175)

The following day, defendants moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. (P. R. 176-179). This motion was submitted on

briefs and denied by the Court in a Memorandum Opinion dated May 22, 1945, on the ground that a jury question had been presented upon conflicting evidence. (P. R. 180-181)

Defendants then noticed the present appeal from the final judgement entered in this action on March 26, 1945. Notice of appeal was filed on August 20, 1945, and appears at page 181 of the Printed Record. A statement of points on appeal was duly served and filed, and is included at page 184 of the Printed Record. The specific errors assigned will be considered hereafter in connection with the discussion of the points involved.

BRIEF STATEMENT OF FACTS AND QUESTIONS INVOLVED

Briefly stated, the questions involved in this appeal, may be resolved into two points:

Point One: Did the trial Court err in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly, in sustaining Appellee's Motion to Strike the Third Defense of Appellants' Answer, setting up the four year Statute of Limitations in bar?

Point Two: Was the verdict in favor of Appellee sufficiently supported by the evidence, or was it contrary to the evidence and so plainly excessive as to indicate that it had been awarded under the influence of passion or prejudice?

So far as material to the present appeal, the facts upon which these questions arise may be summarized as follows:

Appellee, since May 9, 1925, had been employed by Appellant Los Angeles & Salt Lake Railroad Company, an interstate carrier by rail, at its yards at Las Vegas, Nevada, as a car repairman and car inspector. At a subsequent time, Appellant Union Pacific Railroad Company, an interstate carrier by rail, succeeded to the interest of Appellant Los Angeles & Salt Lake Railroad Company, and took over the operation of its rights of way, rolling stock, and other facilities. Since it is conceded that if there is any liability, it is chargeable to Appellant Union Pacific Railroad Company, as successor of Appellant Los Angeles & Salt Lake Railroad Company (P. R. 44), both corporate Appellants, will hereafter be referred to as the Railroad or Appellants.

On November 1, 1934, while the Appellee was so em-

ployed, the Railroad and the Brotherhood of Railway Carmen of America, a labor organization of which Appellee was a member and which was the recognized bargaining agent for the craft or class to which Appellee belonged, entered into an agreement in writing, setting forth the rights and duties of the Railroad and its employees of Appellee's craft or class collectively with respect to rates of pay, rules, and working conditions. A copy of this agreement is annexed to the amendment to Appellee's complaint as Exhibit "A" and appears, in part, at pages 39-40 of the Printed Record.

The relevant portions of this agreement, set forth in haec verba in Paragraph XI of Appellee's Complaint, at Page 7 of the Printed Record, read as follows:

Rule 37. "No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall be apprised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Rule 38. "No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation."

It is not disputed that on or about February 25, 1934, Appellee while employed by the Railroad, and in the course of such employment, fell from the top of one of the Appellants' passenger cars, and fractured his left arm. As a result of his injuries, it is conceded that Appellee was physically disabled and unable to perform the duties of a car man from the date of his injury until May 25, 1936. Appellants' evidence tends to show that the disability continued until a later date, but this is contradicted by Appellee's testimony. It is not disputed, however, that from the date of the accident until May 25, 1936, Appellee was out of service on leaves of absence authorized by the Railroad at his own written request. It is also conceded that on May 4, 1935, the Railroad made a settlement with Appellee, paying to Appellee the sum of \$5,000.00, and that in consideration for this payment, Appellee executed a release of all claims for personal injuries, loss of services, and medical and other expenses arising from the accident.

Appellee's complaint alleges, however, that on May 25, 1936, Appellee was unlawfully and without cause suspended from service and remained suspended until August 20, 1936, at which time Appellee was unlawfully and without cause dismissed and discharged from the service of Railroad (P. R. 7-8). In support of the allegation that Appellee's suspension and subsequent discharge were unlawful and without cause, it is further alleged that Appellee was never apprised of the precise charge against him, was not given an investigation, was not given a hearing by a designated officer of the Railroad, and was not afforded an opportunity to secure the presence of witnesses on his behalf or the right to be present in person or by counsel in connection with the causes for suspension or discharge, all presumably in breach of the provisions of Rules 37 and 38 of the agreement of November 1, 1934, between the Brotherhood and the Railroad (P. R. 8-9). The complaint

also alleged, that in pursuance of the terms of the agreement of November 1, 1934, Appellee was entitled to lifetime employment with the Railroad, or, in the alternative, until he should reach the age of 65 years (P. R. 10).

Three defenses were set up by Appellants in their Answer. The first defense is in the form of a general denial of the material allegations of the complaint, and sets up affirmatively that at the time of Appellee's employment by the Railroad, it was mutually agreed, among other things, that no permanent employment was contracted for and that the term of Appellee's employment was subject to the decision of the Railroad, and that Appellee during his employment, would abide by certain rules and regulations of the Railroad then in force or which might thereafter be adopted, including the Railroad's Hospital Department Regulations and Rules Governing the Determination of Physical Qualifications of Employees (P. R. 22). The second defense sets up Appellee's injury on February 25, 1934, alleges his physical disability as a result thereof to perform his duties of car man until May 28, 1938, and pleads the release above mentioned (P. R. 33-36). The third defense sets up in bar **Section 8524, Nevada Compiled Laws, 1929**, providing a four year limitation of actions upon a contract, obligation, or liability, not founded upon an instrument in writing (P. R. 36-38). This defense was predicated upon the theory that Appellee's cause of action, if any, was upon his parol contract of hiring rather than upon the subsequent collective bargaining agreement of November 1, 1934; that such cause of action, by Appellee's own allegations, accrued on August 20, 1936, or more than four years prior to the commencement of the present action on March 31, 1941. As already noted, however, the portion of the second defense pleading the release, and all of the third defense, were stricken from Appellant's Answer on motion of Appellee.

On issues so made, Appellant introduced evidence tending to show that Appellee was physically disqualified from reinstatement to his duties as car man at least until October 22, 1937, at which time one of the Railroad Company's doctors found him qualified. Appellants' evidence also tended to show that, on several occasions subsequent to this date, and, at all events no later than on October 21, 1938, the Railroad offered to restore Appellee to his duties as car man without prejudice to any claim which Appellee might choose to assert for compensation for the period of his suspension, but that Appellee declined and refused to return to work unless first compensated for wages lost during the suspension period. This evidence is contradicted by Appellee's own testimony to the effect that, at all times after May 25, 1936, he was ready, able, and willing to return to work for the Railroad, repeatedly requested reinstatement, and offered to go back to work and negotiate settlement of his claim for wage loss during the suspension period at a later date, but that the Appellants refused to reinstate him unless he would first waive his claim for such compensation.

Upon this evidence, the jury returned a verdict in favor of Appellee, in the sum of \$8,675.40. The sufficiency of the evidence to sustain this verdict, and whether or not the verdict was contrary to the evidence will be considered in detail under Point Two of this Brief.

POINT ONE

The United States District Court erred in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly in sustaining Appellee's Motion to Strike the Third Defense of Appellants' Answer, setting up the four year Statute of Limitations in bar.

Under this heading, we propose to discuss appellants' first and second assignments of error, which may be found at page 184 of the Printed Record.

It appears from Appellee's Complaint that his cause of action, if any, accrued on the 20th day of August, 1936, the day Appellee alleges that he was wrongfully discharged or dismissed from Appellants' service. This action was not commenced until March 31, 1941, or four years and seven months after Appellee's cause of action accrued. In the third defense, contained in Appellants' Answer herein, Appellants alleged that by reason of the premises Appellee's cause of action was barred under **Section 8524, Nevada Compiled Laws, 1929**, the pertinent portion of which reads as follows:

“Actions other than those for the recovery of real property, can only be commenced as follows: . . .

“Within four years: . . .

3. An Action upon a contract, obligation or liability, not founded upon an instrument in writing.”

The applicability of **Section 8524, N. C. L., 1929**, depends in turn, upon the construction placed by the Court upon Appellee's cause of action. It is Appellants' position that Appellee's cause of action, if any, is upon his parol contract of employment, entered into between Appellee and Appellants on May 9, 1925. If this position is correct, Appellee's action would obviously be upon a contract “not founded upon an instrument in writing,” and subject to

the bar of the four year Statute of Limitations. Appellee contends, however, that he is suing for breach of the written agreement entered into November 1, 1934, between the Brotherhood of Railway Carmen of America, of which Appellee was then a member, and the Railroad. If Appellee's contention is correct, the action would be governed by the six year Statute of Limitations applicable to actions "upon a contract, obligation, or liability, founded upon an instrument in writing," and would have been timely brought.

Before we discuss the merits of this question, it is pertinent to point out that this case is before the federal courts solely upon the basis of diversity of citizenship of the parties, and that no question of federal law is involved. Although Appellants herein are interstate railroads, this is not an action brought under the **Railway Labor Act**, 45 **U. S. C. A.**, Sections 151-164, to enforce an award of a Railroad Adjustment Board, and the two year Statute of Limitations provided in the Act for actions of that character is consequently not involved. **Order of Railroad Telegraphers v. Railway Express Agency, Inc.**, 321 U. S. 342 88 L. Ed. 788. See also **Burke v. Union P. R. Co.**, 129 F (2) 846; **Swartz v. So. Buffalo Ry. Co.**, 44 Fed. Supp. 448.

The present action is a common law action to recover damages for the alleged breach of a contract of employment. It is elementary, that this is a question of state law. And, it is equally well settled that, under **28 U. S. C. A., Section 724**, commonly known as the **Conformity Act**, and **28 U. S. C. A., Section 725**, the **Federal Rules of Decision Act**, in the absence of provisions in the federal statutes expressly regulating the matter, the federal courts will be governed by the applicable state Statute of Limitations and the construction placed thereon by the highest court of the state. **Erie Rd. Co. v. Tompkins**, 304 U. S. 64, 182 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; **Moore v. Illinois Central Railroad Company**, 312 U. S. 630, 85 L. Ed. 1089, 136 F (2) 412.

In the case last cited, to which we shall have occasion to advert again hereafter, the specific question involved was whether the state Statute of Limitations applicable to oral or to written contracts governed, and for failure of the Circuit Court of Appeals to follow the ruling of the State Supreme Court on this question, the judgment of the Circuit Court of Appeals was reversed by the Supreme Court of the United States.

So far as we have been able to ascertain, there has never been a specific adjudication of the Supreme Court of Nevada as to whether a common law action for damages for wrongful discharge is an action upon the parol contract of hiring establishing the employer-employee relationship (and therefore subject to the four year Statute of Limitations) or upon a subsequently executed agreement between the employer and a union of which the Appellee is a member regulating the terms of that employment, violation of which terms is alleged to make the discharge wrongful. In the absence of such adjudication, we submit that it is open to this Court, in reviewing the decision of the District Court upon this question, to make the determination for itself. **Moore v. Illinois Central Railroad Company**, 312 U. S. 630, 85 L. Ed. 1089, 136 F 2nd 412, *supra*.

Let us state at the outset that we do not question the validity of collective bargaining agreements in general, nor of the agreement of November 1, 1934, in particular, nor do we doubt that in an appropriate case such agreements may be enforced by the individual employees who are members of the contracting union and who, by express or implied ratification of such agreement have become entitled to assert rights thereunder. **Rentschler v. Missouri Pacific Rd. Co.**, (1934, Neb.) 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1; **Yazoo & M. V. R. Co. v. Webb**, (1933, C. C. A. 5th), 64 F (2d) 902. But, it is our position that an employee who, by ratification or adoption, has incorporated

the terms of the collective bargaining agreement between his union and his employer into his own individual contract of employment, which in the instant case antedates the collective bargaining agreement by nearly ten years, in suing for damages for alleged breach of such terms is suing upon his individual contract of employment and not upon the collective bargaining agreement. **Illinois Central Railroad v. Moore** (1940, C. C. A. 5th) 112 F (2d) 959, rehearing denied Aug. 8, 1940, reversed on other grounds in **Moore v. Illinois Central Railroad Company**, (1941) 312 U. S. 630, 85 L. Ed. 1089, 136 F (2) 412.

The place of collective bargaining agreements in the law of contracts has been mooted by more than one court in recent years, since the growth of labor organizations and the widespread acceptance of the practice of collective bargaining have repeatedly crowded this question upon judicial dockets. The traditional view of such agreements is stated by Commons & Andrews, in their **Principles of Labor Legislation**, 1920 Edition, at page 18, as follows.

“The so-called ‘contract’ which a trade union makes with an employer or employers’ association is merely a ‘gentlemen’s agreement,’ a mutual understanding, not enforceable against anybody. It is an understanding that, when the real labor contract is made between the individual employer and the individual employee, it shall be made according to the terms previously agreed upon.”

From this initial concept, many courts have evolved the doctrine that the collective bargaining agreement, though a valid and enforceable contract as between the employer and the union, and though precluding by its very existence inconsistent individual contracts, is still not the equivalent of the individual contract of employment, but is simply the standard of reference used by the individual

employee and the employer in entering into the contract of hiring. This appears to be the view of the Supreme Court of the United States as expressed in the two recent cases of **J. I. Case Co. v. N. L. R. B.**, (1944) 321 U. S. 332, 88 L. Ed. 762, and **Order of Railroad Telegraphers v. Railway Express Agency** (1944), 321 U. S. 342, 88 L. Ed. 788, which we shall discuss more fully hereafter.

Under this view, the only material difference between the older and the more modern authorities, is that the latter are more liberal in finding circumstances amounting to ratification or adoption by the individual employee of the terms of the collective bargaining agreement and the incorporation thereof into his individual contract of employment. **Rentschler v. Missouri Pacific Rd. Co.**, supra; **Yazoo & M. V. R. Co. v. Webb**, supra. Thus in the Webb case, exemplifying the modern view on this subject, in holding that a collective bargaining agreement, purporting to establish terms of employment for all employees of the craft or class whether or not members of the union, could be construed as having been adopted by a colored employee not eligible for membership in the union, merely by reason of the fact that he was working under it, the Circuit Court of Appeals clearly enunciated the essential duality of the collective bargaining agreement on the one hand, and the individual contract of hiring on the other. We quote from its opinion, commencing at page 903 of 64 F 2d:

“An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty. . . . But in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between employer and employee. No one is bound thereby to serve, and the employer is

not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances. When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that if they serve they will do so under its terms and will join in maintaining them as applied to others. When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes on the terms thereby fixed. Ordinarily, as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer having the right to discharge at any time and the employee having the right to quit. But the employment though indefinite as to time is a relationship while it lasts, and is subject to the conditions fixed in the working agreement for the industry."

The **Webb** case was cited with approval, and almost identical language was used to express the relationship between the collective bargaining agreement and the individual contract of employment in the **Rentschler** case, *supra*, a well-considered opinion reviewing many of the authorities on this subject. In that case, the mere taking of employment with knowledge of the terms of the collective bargaining agreement was held sufficient evidence of ratification to constitute an acceptance by the employee of what had theretofore been merely "a mutual general offer" and to enable the employee to maintain action against the

employer for damages for his discharge in violation of the seniority provisions of the agreement.

If a collective bargaining agreement between a labor union and an employer, in and of itself, created contractual relations between the members of the union and the employer, it would necessarily follow that where the collective bargaining agreement is for a fixed term the employees covered thereby would also hold their employment for a fixed term. But it has been settled by numerous decisions that such is not the case, and that the general rule (stated in **39 C. J., Sec. 18 b**) that a hiring for an indefinite term is presumed to be at will also applies to employees covered by a collective bargaining agreement for a fixed term. "It is well settled," says Teller, "that a collective bargaining agreement, though for a fixed term, does not, in the absence of any other provision, obligate the employer to continue in his employ the employees covered by the agreement, for the duration thereof. The at-will nature of the employment is not changed by the fixed term of the collective bargaining agreement." Teller: **Labor Disputes and Collective Bargaining**, Vol 1, page 504, par. 168, footnote 95. This doctrine is supported by the following authorities: **Amelotte v. Jacob Dold Packing Co.**, (1940) 173 Misc. 477, 17 NYS 2d 929, affirmed without opinion in (1940) 260 App. Div. 984, 24 NYS 2d 134; **Hudson v. Cincinnati etc. Ry. Co.**, 152 Ky. 711, 154 S. W. 47, 45 LRA (NS) 184, Ann Cas 1915 B 98; **Louisville etc. R. Co. v. Bryant**, (1936) 263 Ky. 578, 92 SW 2d 749; **St. Louis etc. Ry. Co. v. Matthews**, (1897) 64 Ark. 398, 42 S. W. 902; **Lambert v. Ga. Power Co.**, (1936), 181 Ga. 621, 183 S. E. 814; **Cross Mountain Coal Co. v. Ault**, (1928) 157 Tenn. 461, 9 S. W. 2d 692; **Swart v. Huston**, (1941) Kans. 117 P. 2d 576. All of these cases recognize the dual nature of employment under collective contracts, or what might appropriately be called the "two contracts

doctrine.' In the last cited case, the distinction between the collective bargaining agreement and individual contracts of hiring made pursuant to its terms is stated in the following language, appearing at page 578:

"But a collective bargain between an employer of labor and a labor union does not ordinarily constitute a contract of employment between the employer and any individual member of the union. He and his employer make their own contract impliedly at least if not expressly. The collective bargain between employer and union outlines the general conditions under which the business shall be conducted in respect to wages, hours of labor, working conditions, and matters incidental thereto. Ordinarily the collective bargain does not make of itself a contract of employment between A as an employer and B as workman which either can enforce, or which will furnish the basis for an action for damages if it is breached. This is settled textbook doctrine. Thus in the article on Labor, 16 R. C. L. 425, it is said: 'It has been pointed out that the ordinary function of a labor union is to induce employers to establish usages in respect to wages and working conditions which are fair, reasonable and human, leaving to each of its members to determine for itself whether and for what time he will contract with reference to such usages. It has therefore been decided that a labor union, in contracting with an employer with respect to wages and conditions of service for a specified period of time, does not establish contracts between its individual members and the employer, a breach of which will sustain actions by the individuals.'

"Supporting this statement of law are **Hudson v. Cincinnati, N. O. & T. P. Ry. Co.**, 152 Ky. 711, 154 S. W. 75, 45 LRA (N. S.) 184, Ann. Cas. 1915 B, 98; **Piercy v.**

Louisville & N. R. Co., 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322 and annotation; **Southern Ry. Co. v. Morris**, 210 Ala. 463, 98 So. 387; **Panhandle & S. F. Ry. Co. v. Wilson**, (Tex. Civ. App.) 55 S. W. (2d) 216; **Kessell v. Great Northern Ry. Co.**, (D. C.) 51 F. (2d) 304 . . .”

That a collective bargaining agreement between a labor union and an employer does not, in and of itself, create individual contracts of employment between the employer and the union members is further illustrated by the case of **Harper v. Local Union No. 520, I. B. of E. W.** (1932, Tex. Civ. App.) 48 S. W. 2d 1033, where a labor union sought to enjoin violation by an employer of a provision in the collective bargaining agreement wherein the latter had agreed to employ none but union members in good standing. Defendant contended that since the collective bargaining agreement constitutes a contract for personal services, which defendant could not have enforced by injunction, injunction should not lie at the suit of the union, for lack of mutuality of remedy. Holding the suit maintainable, the Court said at page 1041:

“Appellants’ second proposition that injunction will not lie at the suit of the union because the contract is one for personal service, which could not be compelled by injunction, and therefore as to that remedy it is lacking in mutuality, is supported by decisions in several jurisdictions. We have reached the conclusion, however, that the contract in its collective aspect is not one for personal service. In so far as it may inure to the benefit of the individual members of the union, it does not purport to bind the employers to employ any particular workman, or to continue in business; nor does it purport to bind any particular workman to work for appellant, or in fact to continue a member of

the union, or in the particular line of employment. It does bind the employers however, to its several terms if they continue in the business, and it becomes a part of the contract of each member of the union on entering the employment of appellant. The right of discharge for any valid reason is not affected by the contract on the one hand; and the right to leave the employment for any valid reason is likewise not affected on the other . . .”

These examples of what we have called the “duality” of collective bargaining agreements or the “two contracts doctrine” could be multiplied. But we think it unnecessary to try the patience of the court with further quotations from cases dealing with this question in general, since we believe that the specific question of whether an action for damages for wrongful discharge is to be governed by the Statute of Limitations applicable to the parol contract of hiring or by the Statute of Limitations applicable to the written collective bargaining agreement, violation of which is alleged to make the discharge wrongful, has been determined in a persuasive opinion by the 5th Circuit Court of Appeals in **Illinois Central Rd. Co. v. Moore** (1940), 112 F. 2d 959, rehearing denied Aug. 8, 1940. On its facts, this case is almost on all fours with the case at bar. Consequently, we feel that it merits review in some detail.

It appears that prior to 1926, the Plaintiff, a member of the Switchmen’s Union of North America, which had a collective labor agreement with the Alabama & Vicksburg Ry. Co., was working as a switchman for the railroad. In 1926, Defendant Railroad took over the Alabama & Vicksburg Ry. Co., expressly assuming performance of the collective labor agreement. In the course of the consolidation of the two roads, plaintiff’s number on the new seniority roster was moved from the 37th to the 52nd place, resulting

in partial unemployment. Plaintiff, claiming to be entitled to seniority under the old roster established under the Switchmen's Union contract, brought an action against the railroad for damages caused by the partial unemployment. In this litigation, reported in **Moore v. Yazoo & Miss. Valley R. R. Co.**, 176 Miss. 65, 166 So. 395, plaintiff was unsuccessful.

Plaintiff, not unlike Appellee in the instant case, then took a year's sick leave, but, upon reporting back to work at the expiration of this period, was discharged as an unsatisfactory employee. At his own request, plaintiff was given a hearing at which various reasons for his discharge were assigned, but, as the jury later found, the real reason for the discharge was the action which plaintiff had brought under the Switchmen's Union contract. From this hearing, plaintiff appealed to the General Manager, but, instead of appearing at the appointed time, brought an action in the State court to recover damages for his discharge, alleging that at the time of his discharge he was a member of the Brotherhood of Railroad Trainmen, which, since 1924, had had a collective bargaining agreement with defendant, providing, among other things, that no employee should be discharged without just cause.

Defendant's special pleas, including the bar of the three year Statute of Limitations applicable to unwritten contracts, were held good on demurrer in the trial court, but, on appeal, the State Supreme Court reversed and remanded the cause, holding that the Statute of Limitations applicable to written contracts governed. **Moore v. Illinois Central Rd. Co.**, 180 Miss. 276, 176 So. 593. Plaintiff then amended his complaint to claim damages in excess of \$3,000.00, and the cause was removed to the United States District Court on the basis of diversity of citizenship. The District Judge, considering himself bound under the doctrine of **Erie** Rd.

Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487, by the decision of the State Supreme Court, resolved all questions of law in favor of the plaintiff. On appeal, however, the Circuit Court of Appeals for the 5th Circuit ruled the doctrine of the **Tompkins** case inapplicable, and, reconsidering the merits, held squarely that an employee who brings action for damages for wrongful discharge sues upon his parol contract of hiring and not upon the written collective bargaining agreement between his union and the employer regulating the conditions of discharge, and that, in consequence, the Statute of Limitations applicable to parol contracts is controlling. In reaching this conclusion, the Circuit Court said at page 964:

“We are unable to agree that a single employee suing on his contract of employment to enforce his individual right to recover pay or for damages for discharge sues directly upon the collective agreement as a complete contract made for his benefit. See **Yazoo & Miss. Valley Ry. Co. v. Sideboard**, 161 Miss. 4, 133 So. 669. The federal statutes above referred to speak of the collective agreement as ‘an agreement concerning rates of pay, rules, and working conditions,’ (45 U. S. C. A. par. 152 (1) (6), but the individual’s contract is referred to as ‘the contract of employment between the carrier and each employee.’ (45 U. S. C. A. par. 152 (8)). The collective agreement may contain a contract between the union and the carrier, as for an open or closed shop, collection of union dues, and the like, but it is not itself a contract of employment. It binds no one to serve the carrier and binds the carrier to hire no particular person. It is only a basis agreed upon as mutually satisfactory for making contracts of employment. The contracts of employment arise when individual men

present themselves, are examined touching their knowledge of the railroad rules and other things, and stand the required physical examinations, and are severally accepted as employees. Or they arise tacitly when old employees, after the publication of the collective agreement, continue to work. . . . When the collective agreement, tacitly or expressly, is taken as supplying any or all of the terms of the service of a particular employee, it still is not the contract, but only a standard to which the parties have referred in making their parol contract. Such is the view deliberately adopted by this court in a case where a single employee was asserting a right to the pay fixed in the collective agreement, where we held the employee, though not a member of the Union which made the agreement, was employed under its terms. **Yazoo & Miss. Valley Rd. Co. v. Webb**, (5th Cir.) 64 F. (2d) 902. A similar view is maintained both in Kentucky and in Tennessee, where the contract before us also operates. **Hudson vs. Cincinnati, etc. Ry. Co.**, 152 Ky. 711, 154 S. W. 47, 45 L. R. A. N. S., 184, Ann. Cas. 1915 B, 98; **Cross Mountain Coal Co. v. Ault**, 157 Tenn. 461, 9 S. W. (2d) 692. A recent well considered case in which all the authorities are reviewed is **Rentschler v. Missouri Pac. R. R. Co.**, 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1. In it the Webb case was cited with approval and its holdings adopted. See also **Gary v. Central of Georgia Ry.**, 37 Ga. Appl. 744, 141 S. E. 819; Id. 44 Ga. App. 120, 123, 160 S. E. 716. The collective agreement as such is made, defended and changed by the union, but the rights of each employee under it are his own, and he may waive or assert them himself, as he sees fit. **Piercy v. Louisville & N. R. R. Co.**, 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322.

“It follows clearly that when an individual employee

sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement, as Moore does; or because he was not paid the wages fixed in the collective agreement, as Webb did (*Yazoo & Miss. Valley R. R. Co. v. Webb*, *supra*), he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. Moore's contract of employment in 1933 would not be established by merely proving this written collective agreement made in 1924 by a union to which he did not belong and with a railroad for which he did not work. . . .

"His contract of employment standing thus, and no federal statute providing any limitation, we think the pleaded State statute of three years may apply: 'Actions . . . on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.' Mississippi Code, Sec. 2299. It is well settled that a contract is unwritten if the contract itself cannot be proven wholly by writings. (37 C. J., Limitations, Section 86.) 'If there is any break in the chain of the writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years' . . . Any break in the writing or writings which is material and provable only by parol brings the three years' statute into operation.' **City of Hattiesburg v. Cobb. Bros. Const. Co.**, 174 Miss. 20, 163 So. 676, 678. It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer."

We believe that this decision of the Circuit Court of Ap-

peals for the 5th Circuit states the law correctly, and, in fact, reaches the only conclusion which can logically be reached under the "two contracts doctrine," which, as we have already pointed out, is settled doctrine in numerous jurisdictions. It is true, that this decision was reversed by the United States Supreme Court in **Moore v. Illinois Central Railroad Company**, (1941) 312 U. S. 630, 85 L. Ed. 1089, 136 F (2d) 412, but, as we have already noted, the sole ground of reversal was that the question of the applicable state Statute of Limitations having been passed upon by the State Supreme Court in an earlier phase of the litigation, under the **Rules of Decision Act** (28 U. S. C. A. 725) and the rule of **Erie Rd. Co. v. Tompkins**, *supra*, the Circuit Court was bound by the decision of the State Supreme Court on this question. The reasoning of the Circuit Court, however, was in no way impugned, and, on the contrary, in the most recent pronouncement of the United States Supreme Court on this subject, **J. I. Case Co. v. National Labor Relations Board**, (1944), 321 U. S. 332, 88 L. Ed. 762, the "two contracts doctrine" was reaffirmed in the following language, commencing at page 766:

"Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment. Without pushing the analogy too far, the agreement may be

likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.

“After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. **This hiring may be by writing or by word of mouth or may be implied from conduct.** In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

“But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer

the benefit of standard provisions, or the utility customer the benefit of legally established rates."

This statement of the relation of individual contracts of employment to collective bargaining agreements was expressly approved by the United States Supreme Court in **Order of Railroad Telegraphers v. Railway Express Agency, Inc.** (1944) ,321 U. S. 342, 88 L. Ed. 788.

Applying this reasoning to the case at bar, we have a parol contract of hiring made between the Appellee and the Railroad nearly ten years before the negotiation of the collective bargaining agreement, at a time when, for all that appears, Appellee was neither a member of the Brotherhood nor was the Brotherhood the authorized bargaining agent for the Railroad's employees. Granting, for the sake of argument, that when the collective bargaining agreement was made in 1934, Appellee, by continuing in his employment, tacitly ratified the agreement and adopted its terms, we are still unable to see how Appellee's parol contract of hiring in 1925 could be established by proof of the written collective bargaining agreement of 1934, which undoubtedly sets up the wage rates and working conditions of the industry, but creates no individual contracts of personal employment.

This being the case, Appellee's contract of employment, that is, the agreement of the Appellee to serve, and the agreement of the Railroad to accept his services as its employee, is not provable by a writing. Only the extrinsic incidents of the relationship so created, that is, the rate of compensation, the hours of labor, and the conditions of employment (including the rules relative to suspension and discharge) are provable by a writing. But it is well established that a contract partly oral and partly in writing, is in legal effect, an oral contract, an action on which is governed, as to the period of limitation, by the Statute,

governing verbal contracts generally. **37 C. J. 763, Sec. 96, note 18; 34 Am. Jur. 76, Sec. 92, note 19.** And it has been said that “the statutory description of an action as ‘founded on an instrument in writing’ or equivalent phrase refers to contracts, obligations, or liabilities growing, not remotely or ultimately, but immediately, out of written instruments” See **37 C. J. 756, Section 86, note 46.** This rule has also been enunciated by the Supreme Court of Nevada, construing **Section 8524, N. C. L., 1929,** in the case of **Stephens et al v. McCormack** (1928, Nev.) 263 P. 774. Citing with approval the California case of **Chipman v. Morrill**, 20 Cal. 130, 136, decided under a statute worded almost identically with **Section 8524 N. C. L., 1929,** the Supreme Court said at page 776 of its opinion:

“The construction which appellant seeks to have us place on the words, ‘founded upon an instrument in writing,’ was rejected, and we think correctly, in the foregoing decision. The court said:

‘The question is whether the present action is, in the meaning of the statute ‘founded upon an instrument of writing.’ Our conclusion is that this is not thus founded, that the statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word “founded” were omitted, and the statute read, “upon any contract, obligation, or liability upon an instrument of writing.”’

“Appellants attack this construction and claim that the word ‘founded’ is read out of the statute. They say this is

contrary to the decisions of this court holding that, when possible, effect must be given to every word of an act. To this it is sufficient to say that we cannot perceive how the word 'founded' in any way qualifies the meaning of the word 'upon' as used in the statute.

"In **McCarthy v. Water Co.**, 111 Cal. 328, 43 P. 956, it was said:

'But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought.'

"These constructions of a statute the same as ours, except as to the time of limitation, were approved in **Thomas v. Pacific Beach Co.**, 115 Cal. 136, 46 P. 899."

Similar views of the proper construction to be placed upon Statutes of Limitations for causes of action "founded on an instrument in writing have been expressed in **Sommer v. Nakdimen** (C. C. A. Ark. 1938), 97 F. (2) 715; **Pond Creek Mill & Elevator Co. v. Clark** (C. C. A. Illinois, 1921), 270 F. 482; **Societe Nouvelle d'Armament v. Barnaby**, 246 F. 68, 158 C. C. A. 294; **Pickering v. Leiberman** (D. C. Del. 1890), 41 F. 376; **Frishmuth v. Farmers' Loan & Trust Co.**, 107 F. 169, 46 C. C. A. 222; **Boggs Oil & Drilling Co. v. Helmerich & Payne**, 67 P. (2) 579, 145 Kans. 747; **Petty & Riddle, Inc. v. Lunt**, 138 P. (2) 648; **Bracklein v. Realty Insurance Co.**, 80 P. (2) 471, 95 Utah 490, rehearing denied, 82 P. (2) 561, 95 Utah 506; **Manuel v. Hicks Iron Works**, 14 P. (2) 756, 216 Cal. 459.

It follows from what has been said that Appellee's parol contract of employment, made in 1925, as distinguished

from the extrinsic incidents of that employment set forth in the collective bargaining agreement of 1934, is to be deemed a contract "not founded upon an instrument in writing" and therefore governed by the four rather than the six year Statute of Limitations. **Section 8524 N. C. L., 1929.** This must necessarily be so for any or all of the following reasons: **First**, the contract of hiring creating the employer-employee relationship, in and of itself was admittedly either a verbal contract or one implied in fact, and consequently not provable by a written instrument. **Second**, even though the extrinsic incidents of the employer-employee relationship created by the written agreement of 1934 are provable by a written instrument, the most that can be said is that the contract of hiring is therefore partly provable by a writing and partly by parol, and it is settled doctrine that for purposes of the Statute of Limitations such a contract is governed by the Statute applicable to verbal contracts. **Third**, the mere fact that the written agreement of 1934, in the words of the **McCarthy case, supra**, "would be a link in the chain of evidence establishing the cause of action" would not be enough to sustain the position that Appellee's cause of action is "founded upon an instrument in writing."

It may be argued, however, that the very wrong of which Appellee complains consists of the alleged violation by the Railroad of one of the extrinsic incidents of the employment which is ascertainable from the written collective bargaining agreement. Appellee alleges, for example, that his suspension and discharge were wrongful in that the Railroad did not follow the procedures prescribed in Rules 37 and 38 of the agreement, quoted above, setting up certain safeguards relative to the disciplining of employees. If such alleged violation were the sole basis of Appellee's cause of action, there might be something to be said for this point of view. But Appellee claims much more for his cause of

action. In Paragraph XXI of his complaint, he alleges that under the agreement of November 1, 1934, he was entitled to employment for life, or, in the alternative, until he should reach the age of 65, and in the subsequent portions of the same paragraph alleges damages based upon the theory of such permanent employment. Since an examination of the agreement of November 1, 1934, set forth in haec verba as Exhibit "A" to Appellee's Complaint, does not reveal an express provision for permanent employment, such provision, if it exists at all, must be imported into the contract by reason of custom or usage. And this, indeed, has been Appellee's position throughout these proceedings. For example, in his "Points and Authorities Accompanying Pre-Trial Statement," Appellee says:

"The contract, in view of all the circumstances, was a contract for permanent employment or for life (or until Plaintiff should be entitled to retirement under the provisions of the Railroad Retirement Act, Secs. 228-A, 228-S, 45 U. S. C. A.), subject to the right of discharge for cause after a full hearing under the provisions of Rule 37.

"Contracts of employment will be construed in view of well-established customs of the trade to which it relates. 39 C. J. 41.

"In the case of railroad employees it is customary for a man to continue his employment throughout his life or until he is qualified to retire under the provisions of the Railroad Retirement Act and undoubtedly the contract in question was made with these considerations in view."

On the merits of these contentions, it is sufficient to state that where a custom is relied upon to attach incidents to a contract of employment, or to any contract for that matter,

it is necessary to plead and prove not only the custom itself but all the essential elements which go to make the custom valid and binding as between the parties, such as knowledge of the custom on the part of the person to be charged at the time of entering into the contract, or facts showing that the custom was so well known that knowledge is to be presumed. **25 C. J. S. 125, Section 32 (b), Notes 13 and 14.** These essential elements cannot be proved under the general issue. **Cudahy Packing Co. v. Narzisenfeld** (CCA, NY) 3 F. (2d) 567. In having failed to plead or prove such custom or the elements prerequisite to its incorporation into the contract, Appellee could not possibly recover damages upon the theory of a permanent or lifetime employment. Nevertheless, Appellee's error in having failed to properly plead these matters, does not alter the fact that Appellee's entire cause of action was predicated upon the theory of a permanent or lifetime employment. This is clearly shown by Appellee's theory of damages. Since such permanent or lifetime employment could only have been shown, if at all, under proper pleadings, by introducing evidence extrinsic to the written agreement of November 1, 1934, we return to the proposition that **where evidence aliunde must be used to show the existence of the obligation itself, as distinguished from the details of the obligation, the action is subject to the Statute of Limitations applicable to oral contracts.** See **129 A. L. R. 603, at 613 and particularly Homire v Stratton & T. Co. (1914) 157 Ky. 822, 164 SW 67.** The obligation to which we refer, of course, is the alleged obligation of appellants to employ appellee for life or until he should be entitled to retirement under the provisions of the Railroad Retirement Act, subject to the right of discharge for cause after a full hearing under the provisions of the agreement of November 1, 1934.

We conclude that appellee's action for damages for his alleged wrongful suspension and discharge was gov-

erned by the four year Statute of Limitations applicable to contracts "not founded upon an instrument in writing" and that it was reversible error for the District Court to sustain Appellee's motion to strike from Appellants' Answer the Third Defense, setting up **Section 8524 N. C. L.**, 1929, in bar.

POINT TWO

The verdict for appellee is not supported by the evidence, is contrary to the evidence, and so plainly excessive in the amount of damages awarded as to indicate that it was influenced by passion or prejudice.

Under this heading, we propose to discuss, appellants' fourth, fifth, and sixth assignments of error. (P. R. 184.)

Appellee was awarded a verdict fixing his damages at \$8,675.40 for time lost by Appellee by reason of his suspension from the service of the Railroad and for his discharge from such service in alleged violation of his contract of employment.

The evidence shows that Appellee was out of service at his own written request for leave of absence from the time of his injury in February, 1934, until May 25, 1936, the date upon which his last leave of absence expired. (P. R. 61-69). The evidence also shows that in three successive medical examinations conducted on May 21, July 25, and August 4, 1936, respectively, Appellee was found by the Railroad's doctors to be physically incapable, due to his injury, of performing his duties as car man "with safety to himself and others," (P. R. 94-97, 105-107). As a result, on October 20, 1936, he was notified that he had been "disqualified from returning to work as car man." (P. R. 60). It further appears that Appellee was not passed or approved by the Appellants' medical department until October 22, 1937, at which time one of the Railroad's doctors found him physically qualified for "live track duty." (P. R. 52).

Since Appellee was not physically capable of resuming his duties until after October 22, 1937, his suspension from May 25, 1936, until that date must be considered justified under Appellants' "Rules Governing the Determination of Physical Qualifications of Employees," which

were shown to be one of the conditions of employment of each of the employees of Appellants' operating department. (P. R. 103-104).

The principal point at issue, however, is whether or not the evidence shows that Appellants offered, in good faith, to return Appellee to work without prejudice, either on, or at some time prior to October 31, 1938. The uncontradicted testimony of Appellants' witness, J. W. Burnett, who at that time was General Superintendent of Motive Power for the Railroad and represented the Railroad in negotiations with Mr. Thomas J. Eney, Appellee's agent and representative, relative to Appellee's reinstatement, was that some time prior to October 31, 1938, he had offered Mr. Eney to permit Appellee to return to work without prejudice to Appellee's claim for compensation for the time he had lost up until the time of this offer. We quote from Mr. Burnett's testimony, appearing at page 115 of the Printed Record:

“Q. Prior to that time, Mr. Burnett, you did make an offer to Mr. Eney to return Mr. Olive to work providing he would waive his back time, did you not?

“A. Prior to that time I told Mr. Eney that he could go to work if and when he was approved by the medical department and Mr. Eney advised me that he wanted back pay and in those cases we can't settle any back pay arguments at the time we authorize a man to go to work. That is for later consideration and we couldn't even talk to Mr. Eney about back pay to Mr. Olive until he went back to work and appealed his back pay with the organization set up to handle such matters.”

This testimony is substantiated by two letters from Mr. Eney to Mr. Burnett, dated July 26, 1938 and October 21,

1938, respectively, appearing at pages 113 to 115 of the Printed Record, we read as follows:

“J. W. Burnett,
Gen. Supt. M. P. & M.,
Omaha, Nebraska.

July 26, 1938

Dear Sir:

“In reply to your letter of July 12, with reference to the case of W. L. Olive, Carman at Las Vegas, Nevada.

“Wish to state that the Executive Board of the B. R. C. of A., on the Union Pacific System in Ogden, Utah, on June 5, 1938, requested me to negotiate return to service W. L. Olive pending settlement of his claim for compensation from May, 1935, up until the time he was returned to service.

“As per your previous letter which you stated that you would have Olive re-examined and if physically fit he would resume his service as Car Inspector at Las Vegas. Wish to inform you that Mr. Olive refuses to accept this settlement; therefore in accordance with the wishes of the Executive Board, I placed the complete file in the hands of the General President of the B. R. C. of A., Felix H. Knight, Kansas City, for final disposition. I will advise you that you may receive copy of the reply when I hear from him concerning this case.

“Very truly yours,
“THOS. J. ENEY,
“General Chairman J. P. B.”

"Mr. J. W. Burnett,
Gen. Supt. M. P. & M.,
Omaha, Nebraska.

October 21, 1938

Dear Sir:

"This is in reply to your letter of October 22, File No. 011-122-2, received at this office October 27, in which you refer to conferencee in connection with the case of W. L. Olive, Carmen at Las Vegas, Nevada.

"You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive's failure to return to service since October, 1937.

"If, as Mr. Olive requests, you will return him to service with compensation from May, 1935, up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.

"As stated before in conference, I have turned the file over to the General President, F. H. Knight, upon request of the Executive Board of the Joint Protective Board of the Carmen.

"Very truly yours,
"(Signed) THOS. J. ENEY,
"General Chairman J. P. B."

It will be noted that these letters are from Appellee's representative, admittedly authorized to represent Appellee in negotiations with the Railroad relative to Appellee's reinstatement. (P. R. 144). From the first letter, it is unmistakable that Mr. Burnett offered to restore Appellee to service provided he could pass a physical examination, and that Appellee refused to acquiesce in this arrangement. From the second letter, it is apparent that Mr. Burnett had

offered to return Appellee to service and therefore disclaimed responsibility for Appellee's failure to return to service since October, 1937, the first date at which Appellee had been declared physically qualified by a Railroad doctor. It is also clear that Appellee refused to so return to service unless first compensated for time lost since May, 1935, which would include the period between May, 1935 and October, 1937, during which he was physically disqualified from working for the Railroad.

It is true that it is not entirely clear from these letters that Mr. Burnett had made his offer without prejudice to subsequent consideration and settlement of Appellee's claim for compensation for time lost subsequent to May, 1935. But the letters are capable of such inference, and that was the substance of Mr. Burnett's testimony, which is further fortified by the admissions on this score of Mr. Eney, who, it will be remembered was Appellee's authorized representative in these negotiations.

Mr. Eny testified that he had discussed Appellee's case with Mr. Burnett on three occasions. (P. R. 119). At page 121 of the Printed Record, Mr. Eney testified as follows:

“Q. And accepted employment, you say?

“A. I say he was to return to accept his employment at Las Vegas. That was my understanding with the management.

“The Court: Do you know why he didn't?

“A. Well, I would say—he was concerned about the adjustment of the time that was involved, the compensation involved of him being out of employment at the time.

“The Court: Well, was there anything said between you and Mr. Burnett to the effect that he was not to receive the compensation for time off?

“A. “Well, I made demands on the company, my

letter states there, from 1935. However, they wouldn't accept that but they did agree that he could return to service and we could subsequently go in and determine how much the value of the time lost would be.

“The Court: Did Mr. Olive refuse to proceed with that?

“A. He evidently did. He isn't working.

At page 125 of the Printed Record, Mr. Eney testified as follows:

“A. It begins to come to my memory now from the receipt of that telegram, that we held a conference on the subject of returning him to service and it was agreed with the management that we would put him back, pending the suit of his. I tell you the reason why, too. The organization, the committee board appealed over that statement and it was referred to them in the session and continuation in Ogden, Utah, and I was instructed to take the case up with the management further and get him back to employment and subsequently later take up the question of compensation.

“The Court: And did you do that?

“A. Yes, I wrote a letter to Mr. Burnett to that effect. I believe he read the letter.

“The Court: Did the company then offer to do that?

“A. They were agreeable for him to go back to work and discuss it later.”

And, again, on Re-Cross Examination, Mr. Eney emphatically reaffirmed his preceding statements in the following language: “No, he didn't have to go to work and waive anything. He could have gone to work and then re-

quested compensation after he returned to service."

Accordingly then, it appears from the evidence that after Appellants had offered to take the Appellee back without prejudice to his claim, Appellee refused to return unless he was first compensated for time lost from May, 1935.

Prior to the trial of this action, the Appellants served upon the Appellee and filed herein a Request for Admission of Facts, and among the facts requested to be admitted were, "III. That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was General Chairman of Brotherhood Railway Carmen of America," and "IV. That before the commencement of this action, Plaintiff's case for his claimed unlawful suspension from service and discharge from service, by the Defendants, was, at Plaintiff's request and pursuant to Rule 35 of Agreement dated November 1, 1934, marked Exhibit 'A' and made a part of Plaintiff's Complaint, taken to the Foreman, General Foreman, and Master Mechanic, each in their respective order, by the authorized local Committee of said Brotherhood Railway Carmen of America, which Committee was also known as and called 'Local Protective Board of Brotherhood Railway Carmen of America,' and that said L. R. Jarrett, W. L. Thurmond, and Thomas J. Eney, were respectively, the representatives of said local Committee." (P. R. 142-143).

These requested facts were admitted, except that Appellee qualified his admission by alleging in his Response that "his claim was not given an investigation by the said General Foreman or Master Mechanic nor was he given any hearing whatsoever or at all." (P. R. 144). However, Appellee admitted that he had placed his case in the hands of the Local Committee and that Mr. Eney was the representative of the Local Committee, and, ipso facto, the agent of Appellee in his negotiations regarding this matter. Rule 35 of the Agreement between the Railroad Companies and

the Brotherhood (Exhibit "A" attached to Amendment to Paragraph X of Appellee's Complaint, P. R. 39) provides that such grievances shall be taken to the designated officials of the Railroad by the authorized Local Committee or its representative; and it is admitted that Thomas J. Eney was the representative of the Local Committee.

It is a well established principle of law that the principal is bound by the acts of his agent performed within the scope of his authority, and that knowledge of, or notice to, an agent is binding upon his principal so far as it concerns the business conducted through the agent even though the agent does not in fact inform his principal thereof.

3 C. J. S. 194, Par. 262. Consequently, the Railroad's offer to restore Appellee to service without prejudice to his claim for compensation, made to Appellee's agent, Mr. Eney, was binding upon the Appellee, even though this offer was never communicated to him by Mr. Eney.

It should be noted that there is not one iota of evidence in the record showing that Appellee ever was discharged by Appellants except Appellee's own testimony that the note of October 20, 1936, informing him that he had been "disqualified from returning to work as a ear man," constituted his discharge. (P. R. 75). And it has been shown already that this notice was simply the end product of three successive physical examinations in which Appellee had been found physically unable to resume his duties as ear man "with safety to himself and others." It is also apparent from the record that the physical incapacity continued until October, 1937, when Appellee was first qualified by one of the Railroad's doctors. That he did not return to work thereafter is attributable solely to the unwarranted demand made by Appellee to be compensated for wage losses during the period of his physical disqualification, a demand with which appellant was not bound to comply.

Williams vs. Maryland Glass Corporation, 134 Md. 320

106 A 755.

But, assuming for the sake of argument, that Appellee, as he claims, was improperly suspended on May 25, 1936, and wrongfully discharged on October 26, 1936, it is Appellant's position that when their unconditional offer to reinstate Appellee in his former position was made to his agent, Mr. Eney, on, or some time prior to October, 1938, Appellee was bound to accept the offer and return to his employment, and, having failed to do so, is not entitled to recover damages for time lost subsequent to October, 1938. *Dary v. The Caroline Miller* (1888, D. C.) 36 Fed. 507; *Ryan v. Mineral County High School Dist.* (1915) 27 Colo., App. 63, 146 Pac. 792; *Rottlesberger v. Hanley* (1912) 155 Iowa 638, 136 N. W. 776; *Hussey v. Holoway* (1914) 217 Mass., 100, 104 N. E. 471; *Flickema v. Henry Kraker Co.* (1930) 252 Mich., 406, 233 N. W. 362; 72 A. L. R. 1047; *Birdsong v. Ellis* (1884) 62 Miss., 418; *Squire v. Wright* (1876) 1 Mo. App. 172; *Price v. Davis* (1915) 187 Mo., App. 1, 173 S. W. 64; *Bigelow v. American Forcite Powder Mfg. Co.* (1886) 39 Hun. 599; *Levin v. Standard Fashion Co.* (1890) 16 Daly 404, 11 N. Y. Supp. 706; *Connell v. Averill* (1896) 8 App. Div. 524, 40 N. Y. Supp. 855; *Heiferman v. Greenhut Cloak Co.* (1913) 143 N. Y. Supp. 411 (reversed in 1913) 83 Misc. 435, 145 N. Y. Supp. 142, which was later reversed without opinion and original order of trial court reinstated (1914) 163 App. Div. 939, 148 N. Y. Supp. 1119; *Stockman v. Slater Bros. Cloak & Suit Co.* (1920) 182 N. Y. Supp. 815; *Lemoine v. Alkan* (1916) 33 Philippine 162; *Best v. Hermanos* (1918) 37 Philippine 491; *Texas Benev. Assoc., v. Bell* (1887) 3 Tex. App. Civ. Cas. (Willson) 335. See Annotation 72 A. L. R. 1049 at 1054.

If Appellants are correct in this contention, then the verdict for Appellee in the sum of \$8,675.40 is plainly excessive and contrary to the evidence. According to his own testimony, at the time Appellee last worked for the

Railroad, he was receiving a wage of \$6.72 per day and working five days per week; so that his annual earnings must have totaled something less than \$1800.00 per year, (P. R. 72). During the time of Appellee's suspension from his employment with the Railroad, he admittedly earned \$900.00 per year in other employments. (P. R. 83). Under the instructions of the Court, the amount of damages to which Appellee would be entitled, if any, would be the difference between the amount he could have earned, had he remained in the Railroad service, and the amount he earned at other work during the time of his suspension, or a sum not in excess of \$900.00 per year. Judging by the amount of their verdict, the jury must have figured that Appellee was out of service unlawfully for a period of at least nine and one-half years, which, even assuming that his unlawful suspension commenced in May, 1936, was to allow damages for loss of wages until November, 1945. But we have already invited the attention of the Court to evidence showing first, that Appellee was properly suspended at least until October 22, 1937, due to his physical disqualification, and, second, that Appellants offered unconditional reinstatement to the Appellee not later than October 21, 1938, and probably some time before that.

Under these circumstances, we submit, the largest sum that the jury could properly have assessed against Appellants would have been for wages lost by Appellee through unlawful suspension from October, 1937, to October, 1938, or \$900.00. It is said in 25 C. J. S. 994, Damages, Par. 200: "Where the amount of the recovery, if any, in an action for breach of contract is a mere matter of computation, it is obvious that a verdict in excess of the sum ascertained by such computation cannot stand." And the rule is stated thus in 15 American Jurisprudence 660, Par. 230: "A verdict in an action on a contract may be set aside as excessive where the law recognizes some fixed rules and prin-

ciples in measuring the damages from which it may be known that there is an error in the verdict. Otherwise stated, where a fixed standard or scale exists by which the damages may be calculated, the jury will not be permitted to depart therefrom. So, a verdict will be set aside where a calculation shows that the amount allowed is in excess of the damages proved or where there is no evidence whatever of a particular item of damages allowed.” And it has been held that the true test for determining whether a verdict had been influenced by passion or prejudice is to compare the amount awarded with the evidence relied upon to support the award. **Gladstone v. Fortier**, 70 P. (2d) 255, 22 Cal. App. (2) 1; **Day v. General Petroleum Corporation**, 89 P. (2d) 718, 32 Cal. App. (2d) 220.

Applying these principles to the case at bar, we believe it is too self-evident to require further exposition that the verdict is not only excessive and entirely unsupported by the evidence, but is also contrary to the evidence, and that the judgment based thereon should be reversed.

All underscoring in this brief has been our own.

Respectfully submitted,

LEO A. McNAMEE,

FRANK McNAMEE, JR.,

Attorneys for Appellants.

No. 11200

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and
LOS ANGELES & SALT LAKE RAILROAD COMPANY, a
corporation,

Appellants,

vs.

W. L. OLIVE,

Appellee.

ANSWER BRIEF OF APPELLEE

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Attorneys for Appellee.

Service of the within and receipt of a copy thereof is hereby
admitted this.....day of April, A. D., 1946.

.....
Of Counsel for Appellants.

PAUL P. O'BRIEN,

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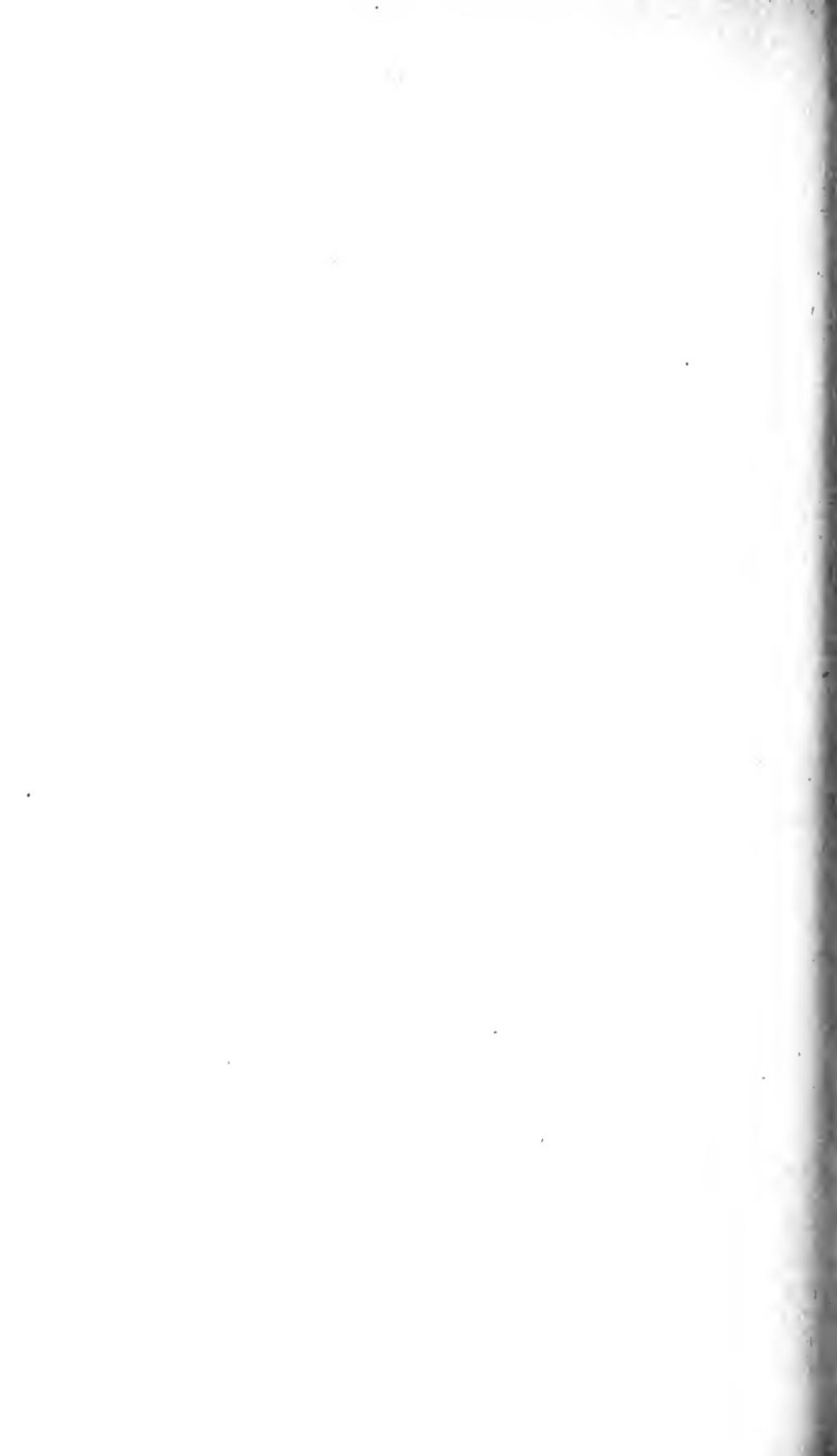
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No. 11200

IN THE

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FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation.

Appellants,

vs.

W. L. OLIVE,

Appellee.

ANSWER BRIEF OF APPELLEE

The statement of the case (Appellants' Opening Brief, pages 1 to 3) is conceded to be correct.

CRITICISM of APPELLANTS' STATEMENT of FACTS

..At page 6 of Appellants' Brief, it is said:

"It is also conceded that on May 4, 1935, the Railroad made a settlement with Appellee, paying to Appellee the sum of \$5,000.00, and that in consideration for this payment, Appellee executed a release of all claims for personal injuries, loss of services, and medical and other expenses arising from the accident."

The inference might be drawn from the quoted statement above that the release referred to (Defendant's Exhibit "G", Rec p 141) was in effect a release for future time lost, or time lost after the date of the release. Such an inference would be incorrect. This release in effect released Appellants for all things therein mentioned to the date of the release, May 4, 1935. The action is for loss of time subsequent to Aug. 20, 1936, as a result of wrongful discharge.

STATEMENT OF FACTS

W. L. Olive brought this action to recover damages for his wrongful discharge, which occurred August 20, 1936, and loss of time and wages resulting therefrom. At the time of his discharge, he was approximately 35 years of age. He started to work for the Appellant, Union Pacific Railroad Company, when he was 16 years of age at Pocatello, Idaho, and, except for a brief period in the early 1920's, he was in the service of one or the other of the Appellants until his wrongful discharge on August 20, 1936. On the 25th day of February, 1934, while employed by Appellant at its Las Vegas yard, in the course of his employment he fell from a car, suffering injuries which kept him out of the service for a period of time. Thereafter, and on May 4, 1935, he accepted a settlement for injuries received and time lost up to May 4, 1935 (Defendant's Exhibit "G", Rec p 141). Olive was on continuous leave of absence up to May 25, 1936 (Rec p 61).

Thereafter, Olive repeatedly reported back for employment, even though he had been found qualified physically by the Appellant's doctors and his own private doctor. He was refused employment and, finally on August 20, 1936, he was notified by Maydahl, the car foreman, in writing, that he could not return to work (Rec p 60).

At the time of his discharge, Appellants and Appellee were operating under a collective bargaining agreement entered into on November 1, 1934 (Appellee's Exhibit 2), the original of which was forwarded to this Court pursuant to Rule 75 (i) for inspection. This agreement provided, among other things, as follows:

"Rule 37. No employe shall be disciplined

without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

"Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation."

In violation of this agreement, Olive was summarily dismissed from the service without a hearing before or after the dismissal, or at all.

An action was brought by the Appellee for the breach of this contract and resulting loss of pay, resulting in a verdict in favor of the plaintiff in the sum of \$8,675.40, from which verdict this Appeal was taken.

The questions involved in this Appeal are presented by Appellants by 2 points. They will be answered in the order presented.

POINT ONE

"The United States District Court erred in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly in sustaining Appellee's Motion to Strike the Third Defense of Appellant's Answer, setting up the four year Statute of Limitations in bar."

DISCUSSION OF APPELLANTS' POINT ONE

The only question is whether or not the contract of November 1, 1934 (Appellee's Exhibit 2), transmitted in its entirety to this Court for inspection, is a written contract within the purview of Sec. 8524, N. C. L. 1929.

The Court's attention is respectfully invited to Appellee's Exhibit 2, the contract of employment. It will be observed that this document is designated (inside cover page) "Agreement Between the Union Pacific System Lines Comprised of * * *" (naming, among others, the Appellants) "and all that class of employes represented by System Federation No. 105, Railway Employes' Department, A. F. of L., Mechanical Section No. 1 Thereof". Then follows the six brotherhoods, including "Brotherhood of Railway Carmen of America", of which Appellee was a member.

It will be observed that this agreement covers 46 printed pages. Within its pages are found provisions, in minute detail, covering practically every matter and thing concerning employer and employee that might arise in the course of employment. For instance, hours of service; overtime; Sunday and holiday work; emergency service; road work; temporary vacancies; assigned road work; filling vacancies; reward for long and faithful service; absence from work; treatment when required to attend Court; paying off; method in

reducing forces; seniority rights; assignment of work; filling temporary foremanships; handling grievances; treatment of Union committees; requirements of apprentices; apprentice services; application for employment; shop conditions; personal injuries; maintaining bulletin board; free transportation of employees; rules for safeguarding and protecting employees; helpers; lead workmen; special rules for boiler makers; machinists' special rules; sheet metal workers special rules; electrical workers special rules; carmen's special rules; rates of pay, and general working conditions.

Thus, it is seen that practically every contingency growing out of employment, or likely to arise in the employment, is provided for.

It is conceded by all parties that this agreement was entered into by the authorized agents of employer and employee.

Furthermore, this is admitted by Appellant to be a written agreement because, in the Statement of Facts (page 4 of Brief), counsel states:

"On November 1, 1934, while the Appellee was so employed, the Railroad and the Brotherhood of Railway Carmen of America, a labor organization of which Appellee was a member and which was the recognized bargaining agent for the craft or class to which Appellee belonged, entered into an agreement in writing, setting forth the rights and duties of the Railroad and its employees of Appellee's craft or class collectively with respect to rates of pay, rules, and working conditions. * * *"

And again at page 11 of his Brief, counsel states:

"Let us state at the outset that we do not question the validity of collective bargaining agreements in general, nor of the agreement of Novem-

ber 1, 1934, in particular, nor do we doubt that in an appropriate case such agreements may be enforced by the individual employees who are members of the contracting union and who, by express or implied ratification of such agreement, have become entitled to assert rights thereunder. * * *"

This type of contract has not only received the blessings of Congress, but is compelled by the express provisions of Statutes of the United States.

Subdivision First, Section 152, Title 45, USCA (Railway Labor Act), provides:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreement or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Under the provisions of Subdivision (5) of Section 158, Title 29, USCA (National Labor Relations Act), it is unlawful for the employer to refuse to bargain collectively with the representatives of his employees. The following are some of the views expressed by Courts construing the latter cited statute:

Under this chapter, employer's refusal to sign a written contract embodying terms of agreement reached with union was a "refusal to bargain collectively" and an "unfair labor practice", and National Labor Relations Board could require employer at the request of the union to sign a written contract embody-

ing the agreed terms. **H. J. Heinz Co. v. National Labor Relations Board, 1941**, 61 S Ct 320, 311 US 514, 85 L Ed 309, affirming, CCA, 110, F2d 843, certiorari granted, 1940, 60 S Ct 1102, 310 US 621, 84 L Ed 1394.

Where employer and union representing a majority of employees in appropriate unit were in substantial agreement on a number of union demands, employer's refusal to embody any points of agreement in a written contract constituted a "refusal to bargain collectively" within prohibition of this section. **Bethlehem Shipbuilding Corporation Limited v. National Labor Relations Board**, CCA, 1940, 114 F 2d 930, certiorari dismissed, 1942, 61 S Ct 448, 312 US 710, 85 L Ed 1141.

Where an oral agreement between an employer and its employees is reached, the parties must embody the agreement in a written contract as a mutual guaranty of conduct, and an employer's refusal to unite in a contract embodying such an oral agreement amounts to a failure to comply with this chapter. **Continental Oil Co. v. National Labor Relations Board**, CCA, 1940, 113 F 2d 473, certiorari granted, 1941, 61 S Ct 72, 85 L Ed 406.

The provision of this section stating that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, requires an employer to embody terms agreed upon with such a representative in a written contract.

H. J. Heinz Co. v. National Labor Relations Board, CCA, 1940, 110 F 2d 843, certiorari granted, 1940, 60 S Ct 1102, 310 US 621, 84 L Ed 1394, affirmed, 1941, 61 S Ct 320, 311 US 514, 85 L Ed 309.

A refusal of employer to put an oral agreement with employees in writing constitutes a refusal to "bargain collectively" within meaning of this chapter. **National**

Labor Relations Board v. Highland Park Mfg. Co.,
CCA 1940, 110 F 2d 632.

An employer's refusal to put in writing the terms of any oral agreement with employees constitutes a refusal to "bargain collectively" within this section. **Arts Metals Const. Co. v. National Labor Relations Board,** CCA 1940, 110 F 2d 148.

Under the title: "Refusal To Bargain Collectively", following the above cited section, commencing at page 195, Title 29, USCA, are found many cases too numerous to cite, of similar import.

It is true that there was some confusion in the initial concept of this type of contract; some of the early courts holding that the contract was merely a standard by which the contracting parties would be guided. However, that theory has long since been rejected by the majority of courts.

At 95 ALR 10, under the annotation entitled "Collective Labor Agreements", there appears a comprehensive note dealing with numerous phases of collective labor agreements. Under this note, at page 15, the author states the modern rule as follows:

"While many theoretical questions have been raised by the text-writers as to the nature and status of a collective labor agreement between a labor union, which is usually unincorporated, and an employer, or an association of employers, likewise as a general rule unincorporated, the courts seem to have had no difficulty in recognizing such status to be of a contractual nature, and in applying thereto, particularly in equity, the principles of the law of contracts."

The view expressed by Appellee has been stated by the Courts in various language, some of which follows:

Thus, in **Harper v. Local Union**, I. B. E. W. (1932; Tex. Civ. App.) 48 S. W. (2d) 1033, the court said:

"The general trend of decisions has been to recognize collective bargaining agreements, when fairly made and for the lawful purpose of securing employment, shorter working hours, and better working conditions. When so made such agreements are generally held to be in the public interest, as offering peaceful solutions of labor disputes and preventing strikes and lockouts and incidental loss arising from unemployment and violence. These agreements are now regarded as primarily for the benefit of the members of the union, and under a variety of theories have been held to be enforceable by the members. Some courts have held that the contracts establish usages or customs of trade; a distinction being

sometimes drawn between usage and custom. Other courts, holding that the association acts for its members, have applied the general principles of agency, while still others * * * treat the agreement as one made for the benefit of third parties. * * * Aside from those aspects of the agreement which give rise to legal rights in favor of the individual members of the union, as such, who have brought themselves within its purview, the collective agreement is now treated in a number of jurisdictions as a contract also between the organization or group as such and the employer. * * * While the decisions are by no means uniform in many respects, upon specific questions that have arisen, generally speaking, the courts have sought to apply the recognized principles of contract law to collective bargaining agreements."

In **Foss v. Portland Terminal Co.** (1923; C. C. A. 1st) 287 F. 33 (reversing (1922; D. C.) 283 F. 204), the question being the right under the Clayton Act to an injunction against a strike, it appeared that the agreement involved was entered into between the plaintiff railroad company and its employees acting through their brotherhood, and, while refusing an injunction, the court referred to the agreement as a contract.

And the validity and the contractual nature of an agreement between a union and a railroad company governing wages and regulations of employment of yardmen was impliedly recognized in **Iowa Transfer Co. v. Switchmen's Union of N. A.** (1933; C. C. A. 8th) 66 F. (2d) 909, which involved the sufficiency of an award of arbitrators under the Railway Labor Act.

In **New England Wood Heel Co. v. Nolan** (1929)

268 Mass. 191, 167 N. E. 323, 66 A. L. R. 1079, in holding that a strike against an employer who had refused to renew an agreement with a union was not justified as an attempt to prevent recalcitrant union members from demoralizing the entire personnel of the union by working for a less rate than they themselves participated in adopting as proper, to prevent the employer from aiding and abetting those members in carrying out that design, or to compel the employer to restore to the union members the standard union rates, the court referred to the expired agreement for a closed shop as a "working agreement".

In **Reihing v. Local Union**, I. B. E. W. (1920) 94 N. J. L. 240, 109 A. 367, an agreement between a labor union and certain employers was said to be a written understanding or collective bargaining agreement, expressing the terms and conditions of the employment for a given period of time, and providing that the employers should employ only union men.

The contractual nature of a closed shop agreement was also recognized in **Stillwell Theatre v. Kaplan** (1932) 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6.

The case of **Rentschler v. Missouri-Pacific Railroad Company** (Neb) 253 N. W. 694, cited and quoted at length by Appellant as sustaining his contention, does not express a view contrary to the contention of the Appellee. In this case, it was held that a collective labor agreement is a general offer that becomes a binding contract when it is adopted into and made a part of the individual contract of each employee, in which case a breach of its terms will give rise to a cause of action by either party. The taking of employment with knowledge of the terms of the agreement seems to constitute sufficient evidence of the adoption of

the agreement.

Views similar to the foregoing have been expressed in numerous other cases, some of which are as follows:

Again, in **Yazoo & M. Valley R. Co. v. Webb** (1933; CCA 5th) 65 F 2d 902, it was said that a collective labor agreement between the managers of an industry and its employees is a mutual general offer to be closed by specific acceptances, and that when negotiated by representatives of an organization it is called "collective bargaining", but that ordinarily the laws of the organization which constitute the authority of the representatives to act do not require the individual members to serve under it, but only that if they serve they will do so under its terms, and will join in maintaining them as applied to others.

In referring to a so-called agreement entered into by a number of proprietors of restaurants, the representative of a union, and a government labor representative, regulating the hours of labor, the scale of wages, and the working conditions of restaurant employees, appearing in the form of a letter, signed by the proprietors, expressly stating that the employers were unwilling to enter into any agreement or contractual relations with the union, the chancellor, in **Sarros v. Nouris** (1927), 15th Del. Ch. 391, 138 A. 607, said:

"Though not an agreement in point of form, yet it was meant to be one in point of fact between the employers and the employees, was so regarded by everybody in interest, and was recognized by the complainants as well as their employees as binding. I therefore shall regard it, as did the complainants, as an expression of obligations which were binding upon them and the faithful

keeping of which the employees were entitled to expect."

Employees who continued working at a lower scale of wages than the scale prevailing in the locality from which their employer came, pursuant to an agreement to that effect between their union and the employer, who further agreed therein that in case the union's requirements of the payment of the higher scale should be upheld in the courts, it would pay the difference to such employees, were held in **Glicman v. Barker Painting Co.** (1930) 227 App. Div. 585, 238 N. Y. S. 419, to be entitled to recover the amount due thereunder.

In **McGregor v. Louisville & N. R. Co.** (1932) 244 Ky. 696, 51 S. W. (2d) 953, in holding that the seniority rights of a railroad telegrapher must be determined by the terms of the contract in force at the time when he transferred from the telegraphic department to another department, the court referred to the agreements involved as "contracts made by the railroad with its telegraphic employees as a result of collective bargaining."

In **Cross Mountain Coal Co. v. Ault** (1928) 157 Tenn. 461, 9 S. W. (2d) 692, it was held that the legal effect of a collective labor agreement between coal operators and the representatives of the coal miners, in the absence of any express contract between the individual employee and his employer inconsistent with its terms, was to make it the basis of the contract of employment between each operator accepting it and each of his employees who entered or continued in the service and employment of such employer with knowledge of its existence. And see **Harper v. Local Union**, I. B. E. W. (1932; Tex. Civ. App.) 48 S. W. (2d) 1033.

In **Gregg v. Starks** (1920) 188 Ky. 834, 224 S. W. 459, while the contract involved resulted from collective bargaining between the railroad company and a conductors' union, it purported on its face to be an agreement with all of the company's conductors, and it was held that the mere circumstances of its negotiation could not exclude other conductors, not members of the organization, from its benefits, when the non-member conductors and the railroad company recognized and treated it as the contract under which the services of such conductors were rendered and accepted, and hence that a conductor who was not a member of the negotiating union could enjoin a breach of the seniority provisions therein.

In holding a written contract between a railroad brotherhood and a railroad management, prescribing a schedule of wages and rules for trainmen, applicable to all trainmen in the railroad's employ, regardless of membership in the union or of color, but not to an employee, a passenger porter, not within the classification of trainmen, the court, in **Yazoo & M. Valley R. Co. vs. Webb** (1933; C. C. A. 5th) 65 F. (2d) 902, said that when such an agreement is not by its terms confined to members of the brotherhood, but purports to cover all employees in the industry of the class it deals with, and is thus published by the employer, non-members who continue in the employment, or who afterwards enter it, accept and adopt the agreement, and are, through the adoption, as fully bound and protected by it as is anyone else.

The Moore case, discussed at length by Appellants, when followed, is very interesting and factually is almost identical with the present case. An analysis of the Moore case shows that the effect of its holding is

diametrically opposed to the contention of Appellants. The following is a history of the Moore case:

The Moore case originated in the State courts of the State of Mississippi. There was a contract of employment involved practically identical with the one in this case and, as pointed out, the facts in the Moore case were substantially identical with those in this case. After trial in the State Court, the case went to the Supreme Court of the State of Mississippi (**Moore v. Illinois Central Railroad**, reported at 176 So. 593). The holding of the Supreme Court of Mississippi was (a) that a contract between railroad and trainmen's union, which included wage schedules, was valid and prevented railroad from discharging trainman at will, and member of union could sue thereon, though he himself had not agreed to work for railroad for any definite time, and (b) that plaintiff's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainman's union was based on written contract with union rather than on verbal contract of employment, and hence was subject to six-year rather than to three-year Statute of Limitations. The trial court was reversed and the case remanded by the Supreme Court of Mississippi, and, upon being remanded, the complaint was amended to claim damages in the sum of \$12,000.00. Thereupon, the case was transferred to the United States District Court for the Southern District of Mississippi, being reported at 24 F. Sup. 731. The District Court of the United States held that:

“A contract between railroad company and trainmen's union as to pay, seniority, and discharge of trainmen employed by company was valid, so as to authorize action by union member

against company for alleged breach of contract by arbitrarily discharging plaintiff without just cause, though he was not direct part to the contract, except as made so thereby for his benefit." and, in effect, followed the Mississippi Supreme Court in its holding to the effect that the contract was a written contract and not oral.

Subsequently, the case was carried from the United States District Court to the Circuit Court of Appeals of the Fifth Circuit (**Illinois Central R. Co. v. Moore**, 112 F. 2d 959). The Circuit Court of Appeals entered the following judgment:

"The judgment is reversed because of error in striking the plea of three years' limitation, and the cause is remanded for further proceedings not inconsistent with this opinion."

At page 18, et cetera, of Appellant's Brief, an extensive discussion is found of the case of **Illinois Central Railroad v. Moore**, 112 F (2d) 959, and the view of the same taken by the Circuit Court of Appeals of the Fifth Circuit. He quotes from this case extensively, but later concedes that the Fifth Circuit Court was reversed by the Supreme Court of the United States upon the ground that the Circuit Court of the Fifth Circuit failed to follow the interpretation given the Statute of Limitations by the Supreme Court of Mississippi.

Counsel, with the material found in the Circuit Court's opinion in the Moore case, builds a colossal and beautiful snow man, which is as completely destroyed by the decision of the United States Supreme Court as if the same had never existed except in his imagination. By force of the decision of the Supreme Court, the snow man exists in memory only. He was

a great snow man while he lived, but he has been completely destroyed by the opinion of the Supreme Court of the United States in **Moore v. Illinois Central Railroad Company**, 85 L. Ed. 1089, in which it was held, at page 1091 as follows:

"Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three-year statute of limitations provided by No. 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: 'The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, No. 2299, Code of 1930, has no application, and the time within which appellant could sue is six years under No. 2292, Code of 1930.' **Moore v. Illinois C. R. Co.** supra (180 Miss 291, 176 So 593).

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of \$3,000, and the railroad removed the case to the federal courts. The District Court considering itself bound by state law, held that the Mississippi three-year statute of limitations did not apply, but on this point the Circuit Court of Appeals reversed, declining to follow the Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: 'Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration.' But the circuit court of appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. **Wichita Royalty Co. v. City Nat. Bank**, 306 US 103, 107, 83 L ed 515, 517, 59 S Ct 420; cf. **West v. American Teleph. & Teleg. Co.** No. 44 this Term (311 US

223, ante, 139, 61 S Ct 179, 132 ALR 956); **Fidelity Union Trust Co. v. Field**, No. 32 this Term (311 US 169, ante, 109, 61 S Ct 176). But the court below did not rely upon any change brought about by the Mississippi legislature or the Mississippi Supreme Court. On the contrary, it concluded that it should re-examine the law because there was involved the interpretation and application of a collective contract of an inter-state railroad with its employees. The court below also based its failure to follow the Mississippi Supreme Court's decision in Moore's case on the ground that in an earlier case the Mississippi Supreme Court had said that the three-year statute applied unless a contract was 'wholly provable in writing', a situation which the court below did not think existed here. But even before the decision in **Erie R. Co. v. Tompkins**, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: 'The construction given to a statute (of limitations) of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations."

In the case of **Davis, Director General of Railroads, v. Rush** (Tex) 288 SW 405, it was held that a contract similar to the one in question in this case was a written contract and enforceable by the employee as such.

It is contended (Appellant's Brief, p 28, et cetera) that the contract in question was partially provable by parole, making the contract an oral contract instead of a written contract, in that the Appellee contended that his employment was for life.

The answer to this contention is found in the Public Statutes of the United States. Reading the same in connection with the contract itself, it appears in Rule 37 (Appellee's Exhibit 2) that:

"Rule 37. No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employee will be apprised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employee has been unjustly suspended or dismissed from the service; such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

And Rule 38 of said Exhibit provides as follows:

"Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged

for any cause without first being given an investigation."

The Act relating to retirement of railroad employees, (Section 228b, Title 45, USCA) provides as follows:

"No. 228b. Eligibility for annuities; time of accrual.

(a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d) :

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eighth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

Such satisfactory proof of the permanent total

disability and of the continuance of such disability until age sixty-five shall be made from time to time as may be prescribed by the Board. If the individual fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2 (a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2 (a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2 (b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the

individual entitled thereto), but—

- (1) not before the date following the last day of compensated service of the applicant, and
- (2) not more than sixty days before the filing of the application.

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service. Aug. 29, 1935, c. 812, No. 2, as amended June 24, 1937, c. 382, Part 1, No. 1, 50 Stat. 309.

Thus, it is seen from the Agreement itself (Rules 37 and 38 quoted above) that the employee may not be discharged or suspended without a hearing, and he may not be dismissed without fault on his part justifying such dismissal; and, if he is dismissed or suspended unjustly, he shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss if any resulting from suspension or dismissal. He may not be dismissed for incompetency where he has been in the service 90 days, nor shall he be dismissed for any cause without first being given an investigation. There is no contention by Appellant that the employee was given an investigation or a hearing in this case. And even after his work is done, he is entitled to a pension (Section 228b, Title 45, USCA, above).

We, therefore, respectfully submit, as to Appellant's Point One, that the contract herein sued upon is a written contract and the six-year Statute of Limitations

is applicable.

DISCUSSION OF APPELLANTS' POINT TWO "POINT TWO"

The verdict for appellee is not supported by the evidence, is contrary to the evidence, and so plainly excessive in the amount of damages awarded as to indicate that it was influenced by passion or prejudice."

It is said in Appellant's Brief at page 33:

"The principal point at issue, however, is whether or not the evidence shows that Appellants offered, in good faith, to return Appellee to work without prejudice, either on, or at some time prior to October 31, 1938. * * *"

In order to clarify this point, it will be necessary to review the record at length.

It will be noted that Appellee was on regular leaves from his employment to May 25, 1936 (R 61-68). That, on October 20, 1936, Olive was advised that he could not return to service (R 60), and we see from the record that he was never given a hearing (R 74). We quote:

"Q. Mr. Olive, I will ask you if prior to your discharge, were you ever advised by the railroad, or any of its officers, of any charge pending against you?

A. No, sir.

Q. Were you ever given an opportunity to present in your behalf witnesses?

A. No, sir.

Q. Were you ever given an opportunity to appear before any investigating committee or board by counsel?

A. No, sir.

Q. Have you received any compensation from the railroad for services or at all since this said dismissal?

A. No, sir.

Q. Was any investigation, so far as you know, held relating to the subject of your discharge?

A. No, sir.

Q. After your discharge did you report the matter to the Local Committee of the Union?

A. Yes, sir.

Q. Do you know what disposition was made of that, if any?

A. Well, failing to obtain any satisfaction myself, I turned it over to the Joint Protective Board Committee to see what they could do.

Q. And when was that, if you recall?

A. With permission, I will have to look at the date.

Q. Will you refresh your memory if you can?

A. It was about November, 1936, I think.

Q. But after the discharge?

A. I am not certain. I think that is about right, November, '36." (R 74-75).

It appears that there is a conflict in the testimony, but this is more imaginary than real when we analyze the record.

After Olive's injury, he first reported back to work on December 18, 1935, and repeatedly reported back thereafter. The stock excuse for not restoring him was for medical reasons. In the words of the witness:

"Q. Did you go back later?

A. I did.

Q. When was that?

A. At various times.

* * * *

A. There were so many dates that I can't remember them all, * * *. (R 48-49).

But during this period, Appellee was examined numerous times by the Railroad physician and found qualified for duty. On January 3, 1935, the Chief Surgeon at Salt Lake City examined the Appellee (R 49). On October 8, 1935, Dr. Landberger, the Chief Surgeon at Salt Lake City, again examined Appellee and found him qualified for live track duty. In May, 1936, he was examined by Dr. Slavin, the local Railroad doctor, and told by Dr. Slavin that he would recommend him as "a borderline case." (R 51-52). On October 22, 1937, he was examined by Dr. Schuler Fagen, who was then the Chief Surgeon of the System, who passed him for live track duty (R52). On May 23, 1936, he was examined by Dr. Balcolm, his own personal physician. At that time, Dr. Balcolm found Appellee in normal health, with a blood pressure of 130/100; that his heart was normal and sound, and that he was physically qualified for any character of physical exertion. In November, 1936, he was examined by Dr. Brown, a medical officer of the Appellant, and passed for live track duty. And the last and final examination (R 52) was on May 27, 1938, by the Union Pacific medical staff in Los Angeles, in the presence of witnesses of the BRC of America; the Brotherhood having insisted that the Brotherhood have a representative present. This representative was Mr. Cryer. This latter examination came about as a result of negotiations had with the Brotherhood and Railroad representatives at Salt Lake City. The meeting of the Brotherhood repre-

sentatives and the Railroad officials at Salt Lake City was fixed as the latter part of May, 1938, and came as a result of negotiations there. It appears from the record that Mr. Knickerbocker never talked to Olive after October of 1936 (R 110). It appears that Mr. Eney, the then current representative, turned over the record of Olive's case to his successor, Mr. Knight, in the forepart of July, 1938. That, at that time, Eney was through with the case and had nothing further to do with it, and did nothing further excepting supply the two gratuitous letters quoted at pages 34 and 35 of Appellants' Brief. In other words, Eney was through, as he indicated in his letter of June 30, 1938, to Mr. Thurman (R 136).

It is contended that reinstatement was offered Olive without prejudice. The record demonstrates that at all times Olive exerted every effort to be restored to duty and adjust past wage differences later. The record also demonstrates that each offer at restoration to duty by the Company was contingent upon Olive's waiving any wage claim to the date of restoration. We quote the record:

"Q. Now, I should like to take you back, Mr. Olive, to the time you first, after you were off during your sickness, that you returned and applied for employment. That was in December of 1935, wasn't it?

A. Yes, sir.

Q. What happened then?

A. I was subject to what they call tossing duty, from one department to another, as I can see it.

Q. I am afraid that is conclusion. Now will you tell what happened and what was said by the

railroad officials, when and who said it, who you talked with and what was said by you?

A. I talked with Maydahl, Berry and Knickerbocker. These were all railroad officials.

Q. Who was Maydahl?

A. Car foreman.

Q. Who was present during the conversation?

A. I believe just the two of us.

Q. And when was it?

A. That was December 18, 1935.

Q. Go ahead and tell what happened.

A. I asked each of them to return to work and each in turn would refer me to the medical department. Then if I took it up with the medical department they would refer me back to the mechanical department and I didn't accomplish anything, so there isn't anything I can tell you about it.

Q. Who was Berry?

A. Berry was the master mechanic.

Q. Where is his place?

A. On the line, I think. He travelled up and down.

Q. And did you talk to him about the same time?

A. Yes, sir.

Q. What did he say to you?

A. He referred me to the medical department.

Q. And did you talk to Mr. Knickerbocker?

A. Yes, sir.

Q. When was that?

A. That was shortly after I talked to Mr. Berry.

Q. Well, when did you talk to Mr. Berry?

Give us a date, if you can, as nearly as you can.

- A. I couldn't give you an exact date.
Q. Well, be approximate.
A. About January, 1936.
Q. Who was Mr. Knickerbocker?
A. He is superintendent of motor power and machinery.

Q. And what did he do?

A. He referred me to the medical department.

Q. And did you speak to anyone else?

A. On quite a number of occasions.

Q. Who that was connected with the railroad company did you speak to?

A. The officials who were in charge. I saw each one of them as I could and on the dates that was convenient to them and those dates are confusing to me. I don't know the dates, but I contacted all the officials I could possibly contact and gained no results from them whatsoever.

Q. Did the company ever offer to return you to work?

A. No, but if I may make that a little more clear—I was offered to be reinstated if I would waive all claim for back pay, which I figured was due me.

Q. When was that offer made?

A. That was made by Mr. Norton, who was superintendent of motor power and machinery.

Q. Do you remember the date?

A. I don't know." (R 54, 55, 56 & 57).

It is true that Mr. Burnett testified that at some indefinite place and time, Olive was offered reinstatement without prejudice. This was likewise testified to by Mr. Eney, the Brotherhood representative, but it is

indefinite as to time and place. The evidence conclusively shows that Mr. Eney never discussed the matter after July 30, 1938, because he turned the file and records over to his successor, Mr. Knight. There is no contention that Mr. Burnett, after that date, made any offer. It will be noted that the file was turned over to Knight by Eney immediately after the examination on May 27, 1938, in Los Angeles in the presence of the representatives of the Brotherhood; and it is interesting to note what transpired at that time. Here are Mr. Eney's words, as they appear in his telegram to Olive on May 30, 1938. We quote:

" 1938 May 30 AM 11 56

S25 25-Omaha Nebra 30 12 1 P

Willard L. Olive

Understand You Have Passed Examination.
Ready to Restore You to Work Immediately on
the Basis of No Compensation for Time Lost.
Advise if You Concur.

THOMAS J.ENEY." (R 125)

Mr. Olive had recently appealed to Mr. Eney to get his case handled like other local cases were being handled; that is, let him return to work and the subject of time lost be discussed at the leisure of others concerned (Appellee's Exhibit 10, R 153), and we quote:

PLAINTIFFS' EXHIBIT NO. 10

No. 48

Telegram

Nite Letter to Thos. J. Eney to Los Angeles
April 30th, 1938.

You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge.

Is it not possible to handle my case like other local cases are being handled and that is to let me

return to work and the subject of time lost discussed at the leisure of others concerned.

Answer return wire.

515 Carson." (R. 153)
W. L. OLIVE

And Mr. W. L. Thurmond, the local representative of the Brotherhood, had recently made a similar appeal to Mr. Eney, in his telegram of December 28, 1937, which we quote:

"Las Vegas Nevada December 28 1937

T J Eney
Rome Hotel
Omaha Nebraska

Norton Requested Conference With Local Committee Today Case W L Olive Stop Norton Willing Reinstate but Requested Signatures of Olive and Committeemen on Waiver of Wage Claim Stop Mr Olive Willing Make Some Concession on Wage Settlement Provided He is Returned Service Immediately Letter Following

W. L. THURMOND." (R 156-157)

But notwithstanding all of these appeals, according to Mr. Eney, the General Chairman, all of these appeals were voices in the wilderness. They were heard by no one as demonstrated by Mr. Eney's letter of June 30, 1938 (Appellant's Exhibit 9, R 136), which we quote:

"Joint Protective Board, Union Pacific Railroad

"Joint Protective Board, Union Pacific Railroad
Brotherhood Railway Carmen of America.

Office of Thomas J. Eney, General Chairman,
1026 W. O. W. Building, Omaha, Nebr.

June 30, 1938.

W. L. Thurmond, Local Chairman

Local Lodge No. 612
226 South 6th Street
Las Vegas, Nevada

Dear Sir and Brother:

This will acknowledge receipt of your letter of June twenty-first with a copy to the executive board members in the case of W. L. Olive.

Management has refused reinstate W. L. Olive unless he withdraws claim for compensation. Therefore, the only alternative for me, is to place same in the hands of the Grand Lodge for their disposal to the adjustment board.

Fraternally yours,
THOMAS J. ENEY,
General Chairman, J.P.B." (R 136)

Does the foregoing indicate that the company offered to restore Olive without prejudice? Or does it show conclusively that Olive made every effort to return to duty subject to the adjustment of his wages at a later time?

It is true, as we have said, Mr. Burnett and Mr. Eney indicated in their testimony that at some indefinite time and place, such as offer had been made. They were relying upon their recollections, which were undoubtedly faulty after almost nine years, as against the expressions as indicated in the above Exhibits, made at a time when the transactions were immediately upon their minds. The jury accepted the views expressed by Mr. Eney in his written communications at the time, which they were amply justified in doing.

If Mr. Eney had intended in good faith to be helpful to the Court and jury in this cause, he undoubtedly would have brought the records of the case so as not to be uncertain in his testimony. His demeanor, as reflected by his recorded testimony, indicates that he

was much more anxious to defeat the claim of the Appellee than anything else, even at the sacrifice of accuracy. It will be noted that he was a witness for the Railroads in this case instead of the Appellee, but even in that frame of mind, Mr. Eney, being pressed on cross-examination, admitted that it was possible that the Company offered to reinstate Olive on the basis that Olive waive all compensation for time lost (R 116).

It is further urged under this Point that the verdict was "so plainly excessive in amount of damages awarded as to indicate that it was influenced by passion or prejudice."

Counsel for Appellants (R 81) fixed the rate of Olive's pay at the time of his dismissal from the service at 81½c per hour for eight hours per day, and fifty-six hours per week. In round figures, he was earning approximately \$2300.00 a year. His claim was for loss of services from October 20, 1936, to the date of the verdict, March 26, 1945; a period of eight years and approximately five months; in round figures, slightly in excess of \$20,000.00. As an offset against that, Olive admittedly earned, during the period he was out of service, approximately \$900.00 a year, or roughly, \$7500.00, netting a total loss of approximately \$12,000.00, on the basis of pay which he was drawing at the time of his discharge. It further appears from the record that the wage scale increased during the time he was out of service, for it is stipulated (R 89) that in 1944 the scale of pay for like services was \$1.09 per hour.

It will never be known how the exact figure contained in the verdict was reached. The record demonstrates that the Appellants got the best of the deal by a substantial margin.

CONCLUSION

The record does not reveal any prejudicial error. It does demonstrate conclusively that the Appellee in this case exhausted every means at his command to effect restoration to duty. It likewise demonstrates that the management consistently and repeatedly refused to restore him to duty unless he would waive claim for back wages, which he was entitled to under the agreement of employment.

We, therefore, respectfully submit that the verdict and judgment are fully sustained by the record, and should be affirmed.

Respectfully submitted,

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